

**WHY ARE VETERANS WAITING YEARS ON AP-
PEAL?: A REVIEW OF THE POST-DECISION
PROCESS FOR APPEALED VETERANS' DIS-
ABILITY BENEFITS CLAIMS**

HEARING
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND
MEMORIAL AFFAIRS
OF THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION

—————
TUESDAY, JUNE 18, 2013
—————

Serial No. 113-22

—————

Printed for the use of the Committee on Veterans' Affairs



U.S. GOVERNMENT PRINTING OFFICE

82-238

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON VETERANS' AFFAIRS

JEFF MILLER, Florida, *Chairman*

DOUG LAMBORN, Colorado
GUS M. BILIRAKIS, Florida
DAVID P. ROE, Tennessee
BILL FLORES, Texas
JEFF DENHAM, California
JON RUNYAN, New Jersey
DAN BENISHEK, Michigan
TIM HUELSKAMP, Kansas
MARK E. AMODEI, Nevada
MIKE COFFMAN, Colorado
BRAD R. WENSTRUP, Ohio
PAUL COOK, California
JACKIE WALORSKI, Indiana

MICHAEL H. MICHAUD, Maine, *Ranking
Minority Member*
CORRINE BROWN, Florida
MARK TAKANO, California
JULIA BROWNLEY, California
DINA TITUS, Nevada
ANN KIRKPATRICK, Arizona
RAUL RUIZ, California
GLORIA NEGRETE MCLEOD, California
ANN M. KUSTER, New Hampshire
BETO O'ROURKE, Texas
TIMOTHY J. WALZ, Minnesota

HELEN W. TOLAR, *Staff Director and Chief Counsel*

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

JON RUNYAN, New Jersey, *Chairman*

DOUG LAMBORN, Colorado
GUS M. BILIRAKIS, Florida
MARK AMODEI, Nevada
PAUL COOK, California

DINA TITUS, Nevada, *Ranking Minority
Member*
BETO O'ROURKE, Texas
RAUL RUIZ, California
GLORIA NEGRETE MCLEOD, California

Pursuant to clause 2(e)(4) of Rule XI of the Rules of the House, public hearing records of the Committee on Veterans' Affairs are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

CONTENTS

June 18, 2013

	Page
Why Are Veterans Waiting Years On Appeal?: A Review Of The Post-Decision Process For Appealed Veterans' Disability Benefits Claims	1
OPENING STATEMENTS	
Hon. Gus Bilirakis, Acting Chairman, Disability Assistance and Memorial Affairs	1
Prepared Statement of Hon. Bilirakis	21
Hon. Dina Titus, Ranking Minority Member, Subcommittee on Disability Assistance and Memorial Affairs	4
Prepared Statement of Hon. Titus	22
WITNESSES	
Keith Wilson, Director, Roanoke Regional Office, Veterans Benefits Administration, U.S. Department of Veterans Affairs	6
Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals, U.S. Department of Veterans Affairs	7
Prepared Statement of Ms. Eskenazi	23
Ronald S. Burke, Jr., Director, Appeals Management Center, National Capital Region Benefits Office, Veterans Benefits Administration, U.S. Department of Veterans Affairs	9
Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims	10
Prepared Statement of Hon. Kasold	28
Executive Summary of Hon. Kasold	30
STATEMENT FOR THE RECORD	
Michael P. Allen, Professor, Stetson University College of Law	31
James D. Ridgway, Professorial Lecturer in Law, George Washington University Law School	45
National Organization of Veterans' Advocates	51
Matthew Middlemas	54
American Federation of Government Employees (AFGE), Local 17	57
The American Legion	60
Disabled American Veterans	61
Veterans of Foreign Wars of the United States	65
Vets First, a Program of United Spinal Association	67
Paralyzed Veterans of America	70
Greg E. Mathieson, Sr.	72
Bergmann and Moore, LLC	75

**WHY ARE VETERANS WAITING YEARS ON AP-
PEAL?: A REVIEW OF THE POST-DECISION
PROCESS FOR APPEALED VETERANS' DIS-
ABILITY BENEFITS CLAIMS**

Tuesday, June 18, 2013

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in Room 334, Cannon House Office Building, Hon. Jon Runyan [Chairman of the Subcommittee] presiding.

Present: Representatives Runyan, Bilirakis, Cook, Titus, O'Rourke, and Negrete McLeod.

**OPENING STATEMENT OF HON. GUS BILIRAKIS, ACTING
CHAIRMAN**

Mr. BILIRAKIS. Welcome, everyone.

The oversight hearing of the Subcommittee on Disability Assistance and Memorial Affairs will come to order.

We are here today to examine the appeals process for veterans' disability claims. Our goal of this hearing is to learn more about the process that is currently in place, identify the areas that need improvement, and look for ways to improve overall efficiency, whether that be by changes in the law, in rules, or in practice.

I anticipate that our VA panelists this morning will provide information on each of their respective roles in the appeals process from the regional office, the Appeals Management Center, and the Board of Veterans' Appeals.

I thank all of you for coming today.

I also look forward to hearing from the court, and I especially thank Chief Justice Kasold of the U.S. Court of Appeals for Veterans Claims for taking the time to be here this afternoon.

Thank you so much.

To date we have heard quite a bit about the backlog of veterans' claims, the VA's concerted efforts to transform the people, process, and technology of the claims system. However, what is not clear is the level of attention that VA is paying towards veterans' appeals.

Recently, VA has instituted a series of initiatives to clear out its oldest claims. And these initiatives require months of mandatory overtime for its employees. Through these measures, VA proposes to complete about 300,000 of these old claims in very short order, within a matter of months.

When a claim is initially decided, it becomes a number in VA's Monday morning report. It is considered a win towards the department's numeric goals for 2015. Yet we know that the Board of Veterans' Appeals projects a workload of over 100,000 appeals in the next fiscal year alone. In fact, many experts have cautioned that VA will soon be encountering a tsunami of appeals.

Earlier this year, the Full Committee raised concerns on VA's ability to anticipate and prepare for challenges in the processing of veterans' claims for disability benefits. And with this potential influx of appeals, VA cannot ignore this process, of course. They must be adequately prepared.

We know that right now every step of the appeals process is plagued by lengthy delays. For those who may not be familiar with the appeals process, here is how it works in general.

After a veteran receives an initial rating decision, they may file a notice of disagreement with the regional office. In response, the regional office will either reconsider the claim or uphold the original adverse decision and issue a statement of the case.

The statement of the case outlines the decision, provides a list of the evidence reviewed, and attaches a list of the laws and regulations applicable to the decision.

A veteran who is dissatisfied with the SOC may file a substantive appeal within 60 days. If a veteran chooses to file a substantive appeal, the claim is sent to the Board of Veterans' Appeals, a semi-independent agency within the VA for review.

This review is performed by VA attorneys and board members sometimes referred to as veterans' law judges who may allow the appeal, deny the appeal, or remand the case back to the RO for further development.

Pursuant to statute, appeals that are remanded require expeditious treatment by the RO. It is of note that prior to 1988, the BVA's decision was considered final and was not subject to any form of judicial review.

In 1988, Congress passed and President Reagan signed into law the Veterans Judicial Review Act creating the United States Court of Appeals for Veterans Claims, an independent Article 1 court with exclusive review of denials from the BVA.

Just as a veteran aggrieved by final decision of the BVA can appeal to the CAVC, a veteran aggrieved by final decision may appeal to the Federal court and ultimately the United States Supreme Court.

Appeals that are remanded through the Federal court system are also statutorily required to receive expeditious treatment. Despite the statutory requirements, appeals claims are often placed on the back burner in favor of initial claims.

The 2012 BVA's report of the Chairman states that the average length of time between the filing of an appeal and the decision by the board is 1,040 days. If a veteran subsequently appeals to the CAVC and the Federal circuit, they might wait nearly twice as long.

Thus, you can imagine this Committee's surprise to learn that appealed and remanded claims were not to be included in VA's oldest claim initiative. Although VA stated that their priority is to provide initial decisions to veterans who have been waiting for two

years or more, many veterans with appealed or remanded claims have been waiting much longer than that.

Unfortunately, lengthy wait times are not the only problems currently plaguing the appeals system. In March 2013, the Federal court issued a ruling stating that the VA acted unlawfully in 2011 when it promulgated a regulation that eliminated certain procedural and appellate rights for veterans appearing before the BVA and ordered VA to show cause as to why sanctions should not be imposed.

VA responded to that order on May 20th, 2013 with a path forward to restore these rights to those veterans affected and it is my hope that VA takes veterans' due process and appellate rights more seriously in the future.

Our Nation's veterans deserve an appellate system that promptly and accurately adjudicates claims that may have been incorrectly decided by VA initially and that gives appropriate and timely consideration to remanded matters.

The veterans' appellate process is a multi-tiered process that spans from the RO to the BVA to the CAVC and beyond. It is my hope that bringing witnesses from each stage in the process together at today's hearing that we may better understand the role each plays in the process and work together in a more efficient manner to process veterans' appeals.

And before I conclude my remarks, I want to highlight that the role of technology in the appeals process cannot be ignored. There has been much discussion on the need for seamless technological capabilities between DoD and VA.

Similarly, VA must ensure that the technology that it has developed, the Veterans Benefits Management System, or VBMS, is equipped to not only meet the needs of ROs, but also those needs of the BVA.

Although the VBMS development team has met with BVA staff, we have heard conflicting reports as to how well the BVA's needs have been received and incorporated into the VBMS to date.

I encourage VA to continue communications with the board to ensure that VA's technology upgrades also meet their needs.

With that, I would like to welcome our witnesses. Today's scheduling was slightly compressed due to various events. Ordinarily we would hold separate panels with VA on one panel and the court on another.

However, due to time considerations today, we are seating a sole panel and the order of the testimony is meant to be indicative of the appeals process. We will start at the regional office and work up to the Court of Appeals for Veterans Claims.

First we have Mr. Keith Wilson, the Director of the Roanoke regional office. He is here on behalf of the Veterans Benefits Administration. Welcome.

Then there is Ms. Laura—I hope I get this right—Eskenazi, yes, Eskenazi, the Principal Deputy Vice Chairman, is here representing the Board of Veterans' Appeals. Welcome.

Finally in terms of VA representation, we have Mr. Ronald Burke, Jr., Director of the Appeals Management Center and the National Capital Region Benefits Office.

Then we will hear from Chief Judge Bruce Kasold who is here representing the U.S. Court of Appeals for Veterans Claims.

We also have numerous statements for the record that have been submitted from various organizations. I would like to thank all of those who submitted them for today's hearing.

With those introductions complete, I am eager to hear from all of our witnesses on how we may improve the overall process for veterans' appeals. I thank you all for being here today.

And now, I would like to yield to my good friend, the Ranking Member, Ms. Titus, for her opening statement. Thank you.

[THE PREPARED STATEMENT OF HON. GUS BILIRAKIS APPEARS IN THE APPENDIX]

OPENING STATEMENT OF HON. DINA TITUS

Ms. TITUS. Thank you, Mr. vice-Chair.

And I want to thank Chairman Runyan for holding this important hearing and tell him that our thoughts and prayers are with him in the loss of his dear friend.

I also want to thank the witnesses for coming today because this is a very important topic and a natural transition from the things we have been focusing on up to date concerning the backlog.

We have heard a lot of testimony, a lot of personal stories, a lot of statistics from the VA about the backlog, but now we need to address what is becoming increasingly important to us, a possible backlog of appeals that seems to be getting worse and potentially will get even more serious as we deal with the backlog of original claims.

I routinely hear from veterans in southern Nevada who say they are just waiting far too long to receive a decision not just on their claim, but on any of their appeals. So improving the speed and efficiency of the claims process and the appeals system will be an important step that we can take towards trying to recognize the brave men and women for all that they have sacrificed for our country.

We often have heard in these hearings from the VA about a transformation that is taking place at the department. And I commend them for that, but it is important that we see that translated into real-time, real-life results for our veterans.

It was promising to hear one VA official suggest that the VA is now at a tipping point of breaking the claims backlog. And I know that some numbers are coming out that show that indeed progress is being made.

However, I know that the veterans in the Las Vegas area do not feel like we have reached that tipping point. The veterans in Nevada along with four counties in California who are served by the Reno regional office are quite frustrated by the length of time that it takes them to hear from the VA on a final decision.

We are one of the worst in the country and the average time is 530 days. That is far from the 125 day goal that has been set by Secretary Shinseki.

I am pleased that General Hickey visited the Reno office and reports back now, that progress is being made and more staff has been hired and some of the additional regional offices are helping

with the backlog, but more needs to be done and it needs to be done faster.

While I am encouraged by the progress, let's not just rest on our morals.

In the past 45 days, as a result of providing provisional ratings and clearing the inventory of old claims, the total number of pending claims has dropped by 44,000 and the number of backlogged claims has dropped by 74,000.

So, again, kudos to the VA for rolling out the Veterans Benefits Management System, at all 56 offices ahead of schedule. I am pleased with that progress.

But I think that all the focus on the dealing with the backlog of claims is going to lead to a decreased focus on dealing with appeals. And that is the purpose of today's hearing to be sure that does not happen.

VBA has surpassed a quarter million claims waiting on appeal and BVA has 45,000 claims pending. The average length of an appeal completed in fiscal year 2012 was around 1,000 days as the vice-Chair pointed out. There is progress, but there is still room for improvement.

What really concerns me is that assuming that VBA does its work through the current backlog by 2015, this could lead to a significant increase in the number of cases that are waiting for resolution of appeal.

By the VBA's projections, the workload will more than likely double by fiscal year 2017 from approximately 45,000 claims today to more than 102,000. This is further compounded by the fact that we have been made aware that VBMS is not ready for use by the VBA.

I, like the vice-Chair also when he spoke of technology, I urge the VA to take the necessary steps to ensure that VBMS is also functional as quickly as possible. It is counterproductive to send electronic files to the VBA in a format that results in more delays for our veterans.

So the intent of, I think, the shift of this Committee from focusing on the backlog to focusing on the claims is not to rob Peter to pay Paul. We do not want to resolve the backlog at the VBA only to create a new one in the appeals process. We have got to figure out how to do both without one harming the other.

I look forward to hearing your testimony and hope that you will give us some recommendations so that we can help you and we can produce the best outcomes for our veterans who are appealing their RO decisions.

Thank you for allowing me to speak, Mr. vice-Chair, and I yield back.

[THE PREPARED STATEMENT OF HON. DINA TITUS APPEARS IN THE APPENDIX]

Mr. BILIRAKIS. I thank the Ranking Member.

I would now like to recognize the panel. Your complete written statements will be entered into the hearing record.

And, Mr. Wilson, you are recognized now for five minutes.

STATEMENTS OF KEITH WILSON, DIRECTOR, ROANOKE REGIONAL OFFICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS; LAURA ESKENAZI, PRINCIPAL DEPUTY VICE CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS; RONALD S. BURKE, JR., DIRECTOR, APPEALS MANAGEMENT CENTER, NATIONAL CAPITAL REGION BENEFITS OFFICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS; BRUCE E. KASOLD, CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

STATEMENT OF KEITH WILSON

Mr. WILSON. Thank you, Mr. Chairman, Ranking Member Titus. My name is Keith Wilson. I am the Director of the regional office in Roanoke, Virginia.

I will describe the appeal process as it occurs at the regional office level. Any decision, final decision that VA makes on veterans' claims is an appealable decision within one year of notification of that decision.

The manner in which veterans can appeal that decision is flexible by design. They can write a specific letter to us telling us specifically what they disagree with. They can just tell us they disagree in general terms.

The point of the flexibility in the program is to make sure veterans are afforded every opportunity for a favorable decision and allow them to get satisfied and in the most expeditious way.

Veterans can appeal either an entire decision that we make on a claim or various issues. By that, I mean we make a decision on a claim, but often the claim will have multiple disability issues that we adjudicate. So a veteran could file an appeal for one decision or ten decisions that we make. Again, completely up to them.

Additional information is often identified when a veteran does file an appeal for the claim decision that was denied. And we do have an obligation to go out and collect additional evidence if it is identified at any time in the process. And we are very happy to do that because we are trying very hard to resolve the appeal at the earliest opportunity in the appeal process.

Throughout the process, it is an open record. We have the opportunity to grant the decision in full or grant the appeal in partial or continue to deny the benefit and ultimately send the case to the Board of Veterans' Appeals for a decision.

When the veteran does file a notice of disagreement with us, a disagreement with the decision, the first thing that we do is provide them a letter providing them an overview of what we call the decision review officer process.

The decision review officers in our facilities have the opportunity to complete a de novo review on that case. In other words, they can look at the evidence of record and based solely on the evidence of record without any new information they can render a different decision on the appeal.

So they could grant the benefit at the regional office level through that process. Many veterans do find it advantageous to fol-

low the DRO process, not all of them, but many of them do ask for that.

If the claim cannot be granted at the DRO level, then we issue a statement of the case to the individual. The statement of case lays out in great detail the decisions that we made on each of the issues under appeal, all the appropriate regulatory guidelines, statutory guidelines, et cetera.

So it is a very large document often, but it provides all the details on the decisions that we have made on his or her claim.

If the veteran continues to disagree with the decision on their claim after reviewing the statement of the case, the veteran provides to us what we call a substantive appeal. In other words, they notify us that, yes, they have read the statement of the case. They continue to disagree and they want the appeal to continue.

They have several options at that point concerning hearings. Once we receive the statement of the case, technically the case at that point is under the jurisdiction of the Board of Veterans' Appeals. Oftentimes, veterans will ask for a hearing when they submit their substantive appeal.

Those hearings have different options. A veteran can ask for a hearing with a BVA member in Washington. They can ask for a video hearing with a board member from our office or they can ask for a travel board hearing.

Members of BVA conduct travel board hearings at the regional offices around the country on average a couple times a year. If the veteran does decide that that is the option they want to pursue, then they will be placed on a docket for when the next available slot would be for the travel board hearing.

Any time during that process, if additional evidence is received, we will review that evidence. If we can grant the claim, the appeal, we will do so. If we are unable to grant the appeal, then we will issue a supplemental statement of the case.

So, again, the veteran receives all the evidence that we used in deciding the claim. Once that is completed, then we will certify the claim to the Board of Veterans' Appeals. And I will defer to my colleagues for the next step in the process.

Mr. BILIRAKIS. Very good. Thank you very much.

I now recognize Ms. Eskenazi for five minutes.

STATEMENT OF LAURA ESKENAZI

Ms. ESKENAZI. Thank you.

Good afternoon, Chairman Bilirakis, Ranking Member Titus, and Members of the Subcommittee. Thank you for inviting me to speak to you today on a very timely and important topic of the veterans' disability compensation appeals system.

This appeals system operates in several stages within VA. Most of the stages in the appellate process are conducted at the VA regional office level within the Veterans Benefits Administration.

The board's work on an appeal does not begin until VBA completes all initial appeals processing actions and certifies and transfers the appeal to the board for a final agency decision. This multi-stage system is why I am accompanied today by both Mr. Wilson and Mr. Burke of VBA.

The board's mission is to conduct hearings and dispose of appeals properly before the board in a timely manner and to provide veterans with one review on appeal to the secretary.

The board has a very unique role in VA. It provides a de novo or new look at each case being appealed from the regional offices which includes a review of every single piece of evidence in the record.

A decision made by the local regional office receives no deference from the board. Each decision of the board must contain written findings of fact, conclusions of law, and a detailed explanation.

Board decisions read like legal appellate briefs including legal citations that support the outcome in the appeal. Board decisions can range from 20 to 40 pages in length depending on the complexity of the case.

Board staff attorneys draft about three decisions per week on an annual basis for review and signature by one of 64 veterans' law judges. Each veterans' law judge signs generally 752 decisions per year.

The board decides appeals in docket order which means that the oldest appeals are worked first. This method ensures that the veterans who have been waiting the longest have their appeals heard first at the board.

Looking over the past two decades, the amount of evidence associated with each appeal has been steadily rising as are the number of issues per appeal which results in longer, more complex board decisions. Even with this growing complexity, veterans have enjoyed an unprecedented level of success at the board in recent years.

In fiscal years 2011 and 2012, the board allowed benefits in 28 percent of the appeals it decided, the highest allowance rate in the past two decades and far higher than the allowance rate of only 13 percent back in 1990.

In fiscal year 2012, the board denied benefits in only 22.5 percent of the appeals it handled. That is far lower than a denial rate of 62 percent back in 1990.

In fiscal year 2012 where the board was not able to allow a benefit, the board remanded or sent back to VBA 45.8 percent of appeals for further evidentiary development to ensure that all procedural protections had been provided to the veteran and that all relevant evidence is obtained.

Despite this remand rate, there is a success story to be told concerning remands. Remands are in large part the result of VA's efforts to do everything possible to help the veteran substantiate his or her claim for benefits and to ensure that no potentially favorable evidence is overlooked.

Remands fall into two categories—avoidable remands and unavoidable remands. Unavoidable remands which make up the majority of remands today are the result of the pro-claimant open record that allows new evidence to be submitted or obtained up until the end, the point that a final decision is made within the agency.

Through intensive training, VA has seen success in reducing the category of avoidable remands from a high of 60 percent back in

2005 when we first started tracking this data to 36 percent fiscal year to date.

With a predicted rise in appeals in the coming years, the board continues to work with its partners in VA as well as external stakeholders to seek efficiencies in this complex appellate process.

I look forward to answering any questions you or the Members of the Subcommittee may have. Thank you.

[THE PREPARED STATEMENT OF LAURA ESKENAZI APPEARS IN THE APPENDIX]

Mr. BILIRAKIS. Thank you, Ms. Eskenazi. I appreciate it very much.

And now, Mr. Burke, you are recognized for five minutes.

STATEMENT OF RONALD S. BURKE, JR.

Mr. BURKE. Thank you.

Good afternoon, Chairman Bilirakis, Ranking Member Titus, and Members of the Subcommittee.

As director of VBA's Appeals Management Center, I direct the operations of an authorized staffing level of 249 full-time employees.

The Appeals Management Center was established in 2003 as a centralized remand processing facility and currently approximately 75 percent of all of VBA's remands are processed by the AMC.

The AMC receives appeals as they are remanded to us by the Board of Veterans' Appeals. Upon receipt, personnel initiate development actions as directed by the remand order.

Once all necessary evidence is obtained and the file is ready for decision, rating veteran service representatives or decision review officers will render a disability determination.

If the decision results in a continued denial or if benefits have not been granted in full, the AMC issues a supplemental statement of the case and subsequently recertifies the appeal back to VBA after appropriate due process has been served.

For cases that result in a full grant of benefits sought on appeal, veterans' decisions are promulgated at the AMC so that benefits can be expedited before returning the claims holder to the RO jurisdiction.

By expediting action on remands, the average days pending for veterans that have appeals at the AMC has been reduced from nearly 400 days down to today's 110 days.

In January of 2012, the AMC established a partial grant processing team. This team was established in order to expedite the promulgating of benefits for veterans that had received partial grant decisions on appeals that also contained remanded issues.

From date on inception to current, the partial grant processing team has served more than 3,380 veterans, delivered more than \$63.5 million in retroactive benefits, and has issued those benefits on average in less than 17 days from receipt of the remand from VBA.

In addition to the processing of remanded appeals, the AMC began brokering in more than 200 notices of disagreement from field offices in February of 2013 and increased that monthly brokering level to 500 notices of disagreement per month beginning

in April of 2013. This effort was established to assist VBA in improving processing timeliness for notices of disagreement.

I appreciate the opportunity to provide remarks on this very important topic and look forward to any questions that you may have for me today. Thank you.

Mr. BILIRAKIS. Thank you, Mr. Burke. I appreciate it.

And now, Chief Judge Kasold, you are recognized for five minutes.

STATEMENT OF HON. BRUCE E. KASOLD

Judge KASOLD. Thank you very much, Mr. Chairman, Ranking Member Titus, and distinguished Members of the Committee.

I am pleased to appear before you today. I commend the Committee's effort in working to ensure that veterans receive decisions on their claims in the most accurate and efficient manner possible.

With my statement being submitted, I will just go over a few key points.

For the first time ever, the court is fully staffed with nine active judges. And we thank this Committee, the other Committees of Congress, Congress, and the President for your past and continued support.

In fiscal year 2012, the court received 3,649 appeals and disposed of 4,355. The court is one of the busiest Federal appellate courts based on the number of appeals filed and decided per judge. We are maintaining our productivity through the tireless effort and focus of our entire court staff.

The court continues to evaluate and modify its procedures to streamline the judicial review process to the greatest extent possible. To this end, our pre-briefing staff conference process has been extremely successful in bringing the appellants and the secretary together to work out mutual resolutions of many appeals.

On average, about 65 to 70 percent of the court's appeals are conferenced and of those, approximately 50 percent end up being resolved by agreement of the parties—generally with a remand.

The court has also made administrative adjustments to assist chambers in providing prompt judicial review of fully briefed cases such that individual single judge decisions are generally decided within 90 days after they get to the judge.

We have also worked with our central legal staff attorneys to streamline their case review process, a process that at one time had 800 cases waiting to be sent to chambers. Now those cases are sent to chambers in under 30 days as an average.

These efforts have cut days out of the procedural development of claims while preserving for each veteran who appeals to the court the right to a full and fair decision.

Despite the court's efforts to streamline its appellate review, the bottom line is litigation is time consuming and affording parties due process adds to the overall wait for decision on appeals.

Cases settled during the conferencing process, for example, still take about six months. Cases that go through the full briefing take a little over a year for the single judge decisions, 245 days are those without any request for extensions. That is the time to file briefs, to get the record, to review the record, et cetera.

We also had about 5,000 requests for extension last year, which on the cases decided by judges averages about a little over two requests for extension each. And generally those requests for extension are for 45 days each, so that is an additional 90 days. That is just the process to go through to allow everyone the time to file their briefs, review the record, et cetera.

The court continues to encourage appointment of a commission to evaluate the costs and benefits of the unique three-tiered Federal appellate review system we have for veterans' benefits decisions.

And on that summary, Mr. Chairman, I will close and take any questions that you have. Thank you.

[THE PREPARED STATEMENT OF HON. BRUCE E. KASOLD APPEARS IN THE APPENDIX]

Mr. BILIRAKIS. Thank you very much.

I will now begin questioning and then recognize the Ranking Member and other Members, of course, alternating in order of arrival.

The first question, I do not think the Chairman has arrived, so I will start.

I would like to start by thanking the witnesses, of course, here today as well as the VSOs who submitted written testimony on this troubling topic.

The scrutiny, and this is for the entire panel, the scrutiny of the backlog is often data driven and we know that VA keeps track of statistics on initial claims such as days pending and average days to complete.

However, VA's Monday morning workload reports only keep track of the number of appeals pending. In other words, there is no indication of the average days pending or days to complete for appealed and remanded claims.

My question is, why doesn't VA make these statistics publicly available via its Monday morning workload reports? For the panel. Who would like to begin?

Mr. WILSON. Mr. Chairman, I will take a shot at it.

It is a little bit difficult for me to provide a full answer because I am really speaking on behalf of the Roanoke regional office. Certainly that information is available and I think it is fair to say that if there is a desire to have that information available, it would be made available.

But I would defer to anybody else that—

Mr. BILIRAKIS. Why wouldn't it be published in the reports, the Monday morning reports? Any reason for that?

Mr. WILSON. None that I am aware of, no, sir.

Ms. ESKENAZI. Sir, the Monday morning reports are kept by the Veterans Benefits Administration, so I will defer to my colleagues on that.

I will note that the board does track its workload. We do not publish it on a regular basis externally. We publish our annual report that shows the trends.

Currently at the board, our cycle time which is the time that it takes on average from when a case comes into the board and leaves the board is 117 days. If you include the period that we allow our

VSO partners to review the appeal and provide written argument, that portion is a total of 251 days of processing time at the Board of Veterans' Appeals level.

Mr. BILIRAKIS. Anyone else?

Mr. BURKE. I will answer that, sir, that the—I cannot speak to the Monday morning workload report. However, all of VBA's appeals processing times and all of the different cycle times in the process are posted by our performance analysis and integrity staff and accessible by RO leadership. So we do have those numbers available to us.

Mr. BILIRAKIS. Thank you.

Next question again for the entire panel. To any of the VA witnesses, could you elaborate on the policy reasons behind excluding appeal of the remanded claims from VA's recent initiative to address the oldest claims?

Oftentimes, these claims end up ongoing, an ongoing cycle of being appealed and remanded several times, as you know, causing veterans to wait many years for a final decision on their claim.

The law requires that claims that are remanded from both the board and the Court of Appeals for Veterans Claims receive expeditious treatment.

Mr. Wilson and Mr. Burke specifically, could you describe how this process works in practice at both the regional office and the Appeals Management Center respectively? Did the appeals design team pilot program offer any solutions as to how to more efficiently process remanded claims and in an expeditious manner?

Mr. BURKE. Sir, I can speak to the appeals design team as the lead for VBA's appeals design team. We did do a year-long appeals process review in the Houston regional office.

The study of the data from that year-long pilot are still being analyzed. Very productive results. The process did lead to a whole host of recommendations that were designed in improving processing efficiencies as well as quality.

Those recommendations are still under review and we hope to be able to get some of those best practices and recommendations deployed to help improve the processing timelines, as I said, as well as quality.

Mr. BILIRAKIS. Mr. Wilson.

Mr. WILSON. Unfortunately, I do not have detailed information concerning the pilot. Roanoke was not part of that pilot.

I think it is fair to say, though, that the manner in which VA tracks its work specifically concerning the two-year effort on oldest claims was never intended to provide a slight of any kind to any of the other workload including appeals. It is just simply a manner in which we chunked out the work to move forward.

Mr. BILIRAKIS. Thank you.

Next question. One more question, and then we will move on.

Many of the statements for the record that were submitted for today's hearing emphasize the need to simplify the appeals process.

If you had the ability to redesign the veterans' benefits appeals process, what would you do differently? For the entire panel.

Mr. WILSON. I can speak from the regional office level and the issue of complexity in the system is very important. As I mentioned in my original discussion, the process itself is open. Evidence can

be added at any time. It is an interactive process. We take any kind of indication from the veteran if they are dissatisfied as an appeal.

The process by design is meant to try to grant benefits whenever possible for the veterans and that is what we try hard to do. But that does lead to a complex process. It leads to a process where there are oftentimes circles in the process as you are going out and getting, for instance, additional evidence.

Ultimately, that would be a good thing if we can grant benefits, but it does take a long time in the process.

Mr. BILIRAKIS. Anyone else? What would you do differently?

Ms. ESKENAZI. Sir, the board has put forth a number of legislative proposals each which we think will add to efficiencies in this complex process.

I do not know that there is a silver bullet, but several of our legislative proposals are targeted towards efficiencies, particularly at the board level.

One of them concerns changing or altering the requirement for the optional board hearing, allowing the board to default to scheduling through video and then offer an in-person if the veteran requests the in-person hearing. That proposal has had some traction of late and we are hopeful that that can move forward.

We have also identified a proposal to alter the type of content in the board decision. As I stated in my opening statement, the decisions have become lengthy and complex. And if we could simplify the content, that could perhaps lead to some efficiencies without taking away from rights of veterans.

We also put forth a legislative proposal on a jurisdictional matter identifying the substantive appeal as a requirement for triggering the board's jurisdiction as opposed to an optional requirement.

And another good success story I would like to report is the board had put forth a proposal about a waiver requirement. In other words, the system is set up that the veteran gets several bites at the apple. And at the point that the veteran files a substantive appeal at the regional office level, if they submit additional evidence at that stage, in the past the RO had to re-look at that and issue a supplemental statement of the case.

With the Camp Lejeune Act which was passed in 2012, there is a provision that became effective in February 2013 that would allow that evidence to come straight to the board for review. Because it is so recent, we have not had the opportunity to appreciate that success, but we believe we will see a lift in efficiencies from that.

Mr. BURKE. I would add to this, sir, that there are several things right now that VBA is using. That further utilization will help with the appeals process.

VBMS, it has got some inherent benefits to that from a quality perspective, but also gives VBA the ability to work subsequent claims at the same time that an appeal is being worked, thus eliminating any delays based on trying to process both a subsequent claim and an appeal.

Continued use of DBQs, I think, will also lend the quality aspect and lead to more accurate decisions. Further utilization of fully de-

veloped claims should also cut down on the appeals workload and standardization of forms.

Specifically, one that came out of the design team was a notice of disagreement form. That would make it much easier to review a submission by a veteran or an accredited representative to tell that that is, in fact, a notice of disagreement.

As we did the design team pilot, we noticed that many of the notice of disagreements that were put under controls untimely were because they were hard to decipher whether or not they were a subsequent claim or a notice of disagreement. So some of those would help with our appeals process as well.

Mr. BILIRAKIS. Chief Judge Kasold.

Judge KASOLD. Thank you, Mr. Chairman.

I believe it is this Committee's proposal, that a commission be developed and I support it. I think it is a very complex issue on a system that has been developed rather piecemeal over a significant amount of time with judicial review over the last 24, 25 years.

You have two de novo reviews down below. They take time. You have reopening at any time of a claim. You have clear and unmistakable error assertion against old board decisions at any time. You have two appeals of right at the judicial level.

This is a system that allows a veteran many, many, many opportunities to submit additional evidence. And I am not suggesting that that is wrong, but you have to weigh that against the time it takes to process each of these.

I do not have any apologies for the secretary and do not know his operations down below, but there are 1.3 million initial claims being processed.

As I understand it, the board has somewhere around 50,000, maybe going up to 100,000 over the next four years, which as a side note could really impact the court because we receive a derivative of these claims.

Of the claims filed, about five percent, a little less than five percent, get to the board. And then of that, 8 percent of the claims that get to the board get to the court.

So you have two different systems. One is that initial claim, how do you get it processed in a timely manner, and then you have all these protections, if you will, for the veteran to allow him to have a second de novo review, to reopen a claim ten years later, to go against a 20-year-old claim based on clear and unmistakable error, and to have two judicial reviews at a Federal appellate court.

So I would support the Committee's approach towards this, that a commission be created to take a look at that system.

Mr. BILIRAKIS. Thank you very much.

Now I will recognize the Ranking Member, Ms. Titus, for as long as she wants. I know we do not have a lot of time, but maybe we can—again, when we reconvene, you can continue. Thank you.

Ms. TITUS. Well, thank you, Mr. vice-Chair. I will be brief.

I appreciate your testimony. I just want to step back and try to look at the big picture. I appreciate all of this that you have laid out of ways that you are addressing the backlog and reducing the number of cases, VBMS, virtual docket for scheduling, videoconferencing, this pilot program that you mentioned, appeals design team.

That is all great, but it seems to me we are looking backwards. We are always reactive in the VA figuring out how to deal with the problems and the cases that already exist there.

We have got to anticipate, I believe, a great increase in the number of appeals that you all are going to be hearing over the next couple of years.

We have just been hearing all the things that have added to the number of original claims. We are dealing with the two-year cases. Then we are going to deal with the one-year cases.

You have got the Vietnam veterans who are now in the system. You have got the veterans from the wars that are winding down in the Middle East coming into the system. You have got increased complexity of the cases that come to the system. You have got a greater proclivity to litigate everything in society.

Are you ready for this? This is an onslaught. I do not hear any of you talking about the need for more space or more lawyers or more training. You know, this is coming. Are we going to now come back in five years and talk about what we are trying to do dealing with this after the fact as opposed to getting ready for it knowing that it is coming?

Anybody want to address that?

Ms. ESKENAZI. Thank you, Member Titus. I would be happy to take that question.

At the Board of Veterans' Appeals, we predicted that this fiscal year we would receive 54,000 appeals. And so far, we are at 37,000. So we are on track to meet that prediction. It is not very different from past years. In 2012, we received 52,000 appeals. So the incoming for us is in the outer years, but they are coming and we are working to gear up to meet that challenge.

We are in discussions with the secretary about internal resources and we are actively hiring a great number of attorneys, executing every dollar in our current budget to get new attorneys in, doing a new type of training with them to hopefully have them hit the ground running and to think of new ways to do what we have been doing to be ready for this large increase of appeals that are coming.

Ms. TITUS. That does not give me a lot of confidence. You are not giving me very many specifics here, but at least you recognize it is a problem.

Anybody else?

Judge KASOLD. I can assure you that if they go to 100,000 claims as predicted over the next several years, I or my successor will probably be here discussing with you the need for additional support.

What has happened in the last couple of years is the number of appeals from the board to the court has actually gone down slightly, while two additional judges have been appointed, bringing us to nine. It takes about a year to get a new judge fully up to speed, and we are constantly reassessing how we can best handle the appeals that are coming in with the number of judges that we have.

On the current number of appeals, I think that we are well staffed. The Committee has always been very supportive of the court. As the numbers go up, if they do, which I think everyone thinks they will, we will be assessing that and coming back to the Committee.

Thank you.

Ms. TITUS. Mr. Chairman, thank you.

Mr. BILIRAKIS. Okay. Very good. We will give you another opportunity if I am still the Chairman.

We expect Chairman Runyan to return after the break, but we have three votes and we will go ahead and recess now and hopefully return by approximately 3:15.

Thank you. Thanks for your patience.

[Recess.]

Mr. RUNYAN. [Presiding] The Subcommittee will come to order.

And I want to thank everyone for coming back and apologize for not being here earlier. I was tending to some personal—I had a college roommate of mine pass away over the weekend, so we had a funeral back in Ann Arbor. It was a rough one, but thanks for coming back.

I am going to ask a few questions. I do not know if anybody from the minority or the majority may. I know Chairman Miller may stop by here. My first question is actually going to be for Mr. Wilson.

In 2011, U.S. Government Accountability Office investigated VA's DRO review process with a report entitled Clear Information For Veterans And Additional Performance Measures That Could Improve The Appeals Process.

GAO made three recommendations for VA action which were revised sample appeals, election letter within the policy manual, and test the letter's clarity with veterans; secondly established national and regional office performance measures related to the appeals resolution at the regional level and ensure sufficient quality review producers are in place; and, third, assess the knowledge and skills that the DROs need to perform their job and developing a training program tailored to the DROs.

And are you aware of what action the VA has taken on these recommendations since 2011?

Mr. WILSON. Unfortunately, I am not familiar with the specifics from a national perspective. I am able to talk at the Roanoke level concerning the performance metrics. We do have performance metrics in place. Those are national measures.

But concerning the specific recommendations of the report, unfortunately, I am not able to address those. I do not know if Mr. Burke could or we would be certainly happy to take the information for the record and provide a response.

Mr. RUNYAN. Do you have anything, Mr. Burke?

Mr. BURKE. Yes, sir, I do. I know that currently VBA is in the midst of negotiating revised DRO performance standards. And it was a recommendation of the appeals design team to look a little more closely at the de novo review as opposed to traditional election.

We are still analyzing the results of a year-long pilot. We hope to have the analysis completed here shortly so that we can put forth our ideas or suggestions about the utilization of the de novo reviews compared to traditional election.

Mr. RUNYAN. I have a long list of things I would love to get to, but I am respectful of everybody's time.

Mr. RUNYAN. Ms. Eskenazi, correct?

Ms. ESKENAZI. Eskenazi, yes.

Mr. RUNYAN. Yes. Can you state for the record what specifically the board needs to do in order to process appeals in VBMS?

Ms. ESKENAZI. The board has been working with the VBMS team in VBA since the inception of the VBMS which is the new robust system. We had virtual VA and we are moving into the VBMS.

So we have been working on that work group for several years now. We have an extensive list of programming requirements. And to date, the focus has been on gearing up VBMS for processing the large number of claims that the department has seen. And now we are shifting into the appeals work.

To date, the board has received less than ten appeals certified to us in the VBMS system. I think it is actually eight. And they have all come from the Appeals Management Center. They are cases that have previously been to the board. We remanded to the Appeals Management Center, VBA for additional work, and they are now aggressively scanning and they have returned eight to us in the system.

We have done our initial training in May and we are in the process of ensuring that all of our staff have the necessary clearances through the IT officials to access that system. We have about a third of our staff with the access currently.

We have also identified the top four programming requirements that we would like the VBMS team to focus on and ensuring that we get in the 6.0 release. I am told on Friday, my understanding is that the board's top four requirements are scheduled to be in that 6.0 release.

So that is scheduled for late in the year. In the meantime, we have identified methods of working those VBMS claims, working around what we do not currently have programmed in until the point that we have those programming requirements and can be working at a higher level of efficiency.

We are looking forward to getting our hands into the system. So far, we have only done a pilot with inactive appeals to kind of see what it looks like. So we are looking forward to working these active appeals to continue to refine our requirements.

Mr. RUNYAN. So is it safe to say that as far as VBMS goes, we are even further behind in the appeals process than we are in adjudicating new claims?

Ms. ESKENAZI. Well, we have not seen any appeals yet. Like I said, these first few just came in the past few weeks. And it is actually good timing now that we have the access. We are going to work them. We are going to take detailed notes on the effectiveness of the system and continue to work with the programming team to refine those requirements.

Mr. RUNYAN. I will just put this out there. In the VA metrics, because there were not medical exams being given, will we see a bigger backlog in the appeals process?

This is really, the Committee's fear. Because of our reporting mechanisms VA is not so concentrated on the backlog in the appeals process, and I think Judge Kasold will say that it is growing.

With the push to get these older claims out of the way, it is going to lead to an appeals' backlog. What are the panel's thoughts on this?

Mr. WILSON. Mr. Chairman, I can address that from the Roanoke perspective.

First of all, one of the heavy lifts for us in Roanoke in order to get these oldest non-appealed claims out was getting the medical exams. We did not cut corners on getting medical exams. We ordered a lot of medical exams. And that was really one of the long poles in the tent in terms of getting these claims done timely. So I can assure you we did not cut corners in terms of getting exams for those veterans.

The other thing I can say is we are not letting this effort for the two-year claims interfere with our ability to continue to work appeals. We have not peeled off any of the people from our appeals team or quality team to do those two-year-old claims.

Now, nationally we have implemented a mandatory overtime policy which does include the people in our appeals team and our quality teams. During the mandatory overtime, those employees are working on the two-year initiative. But when they are doing their regular core hours, they are continuing to focus on quality and appeals.

Mr. RUNYAN. We all agree. Getting it done right the first time eliminates the appeals process a lot of times. But history is going to say that there is potential that we have an issue in the appeals process as we move forward.

I want to make sure that we are all aware of that because sometimes as we are moving forward, it sounds great, but in reality we are creating another problem. And it is personally frustrating to me.

Mr. WILSON. We are not interested in robbing Peter to pay Paul. We are not at all happy with the amount of time it takes to process an appeal. We are not at all happy with the amount of time it takes to process a claim. But I can tell you flat out that we are not robbing from Peter to pay Paul. We are focusing on both.

Mr. RUNYAN. I get that. But I believe appeals have averaged 1,040 days to process, if I am correct.

Ms. ESKENAZI. Sir, I would like to address that timeframe. The appeals system in VA is a multi-stage process. That particular 1,000 days process is the point that the veteran completes the formal appeal action at the VBA RO level, files their Form 9, and the board completes its action.

At the board, when we get our hands on the case, we are turning them around in 117 days. If you count the time that our VSO partners have to review that case, then we are turning them around in 251 days.

One thing, as VBA takes in more claims to serve more veterans with benefits, it naturally will lead to more appeals. Veterans have a right to an appeal. And there has been studies on correlations of quality between the appeal rate and high-quality stations may have high appeal rates, so there is not really a correlation there.

If you look back over trends, generally the board gets about five percent of what VBA takes in that year. So we are taking those numbers that VBA is taking in and projecting the outer years. And we are predicting an increase in appeals.

Part of the efforts that we are doing at the board to address that incoming rise in appeals, and I neglected to give the details on this

when Ranking Member Titus asked this question earlier, we are doing an aggressive hiring campaign and we are hiring 100 new attorneys between now and the end of the fiscal year.

That is a significant proportional increase in the board staff. We are trying to get these people in, get them aggressively trained, and gear up for that future load that we see coming to the board.

Mr. RUNYAN. My next question regards that process.

Judge Kasold, as you note in your testimony, the Court of Appeals for Veterans Claims has exclusive jurisdiction over denials by the Board of Veterans' Appeals and the court is one of the Nation's busiest appellate tribunals.

If you could give your fellow panelists at the board here one piece of advice on how to improve the quality of BVA decisions, what would that be?

Judge KASOLD. I can only suggest what they already know, the number of remands that are sent back to the board primarily involve reasons and basis error, or lack a medical exam, or fail to address favorable material.

I do note that we get an appeal somewhere in the neighborhood of eight percent or nine percent of the cases decided by the board that are not remanded by the board—remanded claims are not appealable. And about 70 percent of the appeals to the court involve representation by attorneys.

These appeals go through the conferencing process that we have established at the court and about 50 percent of those appeals are settled by the parties' attorneys which for VA, is group 7. And so, at some of the functions that the court has had, I have mentioned that perhaps what group 7 sees and learns could be incorporated within the training that the board does.

And I think they may have actually done that, if I am not mistaken—because the group 7 attorneys can share with the board their insight from the cases that they see and the negotiations that they have in that conferencing process.

Just focusing on those three areas, though, I think would be helpful. Obviously to see if you can identify them ahead of time before they get to the court would be helpful in both the remand rate where the secretary's counsel agrees and then also when they ultimately get to the judges.

Mr. RUNYAN. Kind of talking in that same line of thought there, you noted in your testimony the number of appeals that come to the court unrepresented but that acquire representation during the course of their appeal.

Could you comment on the effect that a representative can have on the quality and nature of the appeal moving forward?

Judge KASOLD. I do not have any statistics per se. But just in reviewing the cases, lawyers generally frame the issues better than the veteran does. That is why we require all the cases that involve representation by counsel to go through the conferencing process.

That process requires the counsel for the veteran to identify the issues on appeal, to share those issues with the secretary's counsel and then participate in a conference with our central legal staff.

That process, because the issues have been identified by counsel, I think, is a significant part of the reason why you have the 50 percent remand rate. Issues are being identified by counsel, explained

to the opposing counsel, and discussed with our central legal staff, which gets a 50 percent remand rate.

We also see the benefits of representation in the briefings that come in. You have a fully briefed case by counsel which explains those issues in the cases that get to the judges, versus the pro se brief where many of the veterans are really expressing dissatisfaction but not identifying error.

So if an appellant can get representation, I would say it is probably beneficial to them to do so. I note that there is the active pro bono program that provides representation, and that is why at the end, I think it is somewhere close to 70 percent are represented.

Mr. RUNYAN. Again, I want to thank you all for being here. I would like to again thank you all for your testimony and looking forward to continuing to work with each and every one of you on these important matters.

With that, you are all excused. I want to thank everyone for being with us today. I look forward to future updates on the initiatives we have heard about today and look forward to working with all of you throughout this Congress to ensure we improve the veterans' disability claims appeals process.

I would like to again thank all of our witnesses for being here and ask unanimous consent that all Members have five legislative days to revise and extend their remarks and include any extraneous material. Hearing no objection, so ordered.

I thank the Members that were here earlier for their attendance today, and this hearing is adjourned.

[Whereupon, at 3:56 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Prepared Statement of Hon. Gus M. Bilirakis

Good afternoon and welcome everyone. This oversight hearing of the Subcommittee on Disability Assistance and Memorial Affairs will now come to order.

We are here today to examine the appeals' process for veterans' disability claims. Our goal in this hearing is to learn more about the process that is currently in place, identify the areas that need improvement, and look for ways to improve overall efficiency—whether that be by changes in law, in rules, or in practice.

I anticipate that our VA panelists this morning will provide information on each of their respective roles in the appeals' process — from the Regional Office, the Appeals Management Center, and the Board of Veterans' Appeals—I thank you all for coming today.

I also look forward to hearing from the Court, and I especially thank Chief Judge Kasold (Kaz-old), of the U.S. Court of Appeals for Veterans Claims, for taking the time to be here this afternoon.

To date we have heard quite a bit about the backlog of veterans' claims, and VA's concerted efforts to transform the “people, process, and technology” of the claims' system. However, what is not clear is the level of attention that VA is paying towards veterans' appeals.

Recently, VA has instituted a series of initiatives to clear out its oldest claims, and these initiatives require months of mandatory overtime for its employees. Through these measures, VA proposes to complete about 300,000 of these old claims in very short order—within a matter of months.

When a claim is initially decided, it becomes a number in VA's Monday Morning Report. It is considered a “win” towards the Department's numeric goals for 2015. Yet, we know that the Board of Veterans' Appeals projects a workload of over 100,000 appeals in the next fiscal year alone.

In fact, many experts have cautioned that VA will soon be encountering a “tsunami of appeals.” Earlier this year, the Full Committee raised concerns on VA's ability to anticipate and prepare for challenges in the processing of veterans claims for disability benefits. And, with this potential influx of appeals, VA cannot ignore this part of the process. They must be adequately prepared.

We know that, right now, every step of the appeals process is plagued by lengthy delays. For those who may not be familiar with the appeals process, here is how it works in general:

After a veteran receives an initial rating decision, they may file a Notice of Disagreement (NOD) with the Regional Office (RO). In response, the RO will either reconsider the claim or uphold the original adverse decision and issue a Statement of the Case (SOC). The SOC outlines the decision, provides a list of the evidence reviewed, and attaches a list of the laws and regulations applicable to the decision. A veteran who is dissatisfied with the SOC may file a substantive appeal within 60 days.

If a veteran chooses to file a substantive appeal, the claim is sent to the Board of Veterans' Appeals (BVA), a semi-independent agency within the VA, for review. This review is performed by VA attorneys and Board Members, sometimes referred to as Veterans Law Judges, who may allow the appeal, deny the appeal, or remand the case back to the RO for further development. Pursuant to statute, appeals that are remanded require “expeditious treatment” by the RO.

It is of note that, prior to 1988, the BVA's decision was considered final, and was not subject to any form of judicial review. In 1988, Congress passed, and President Reagan signed into law, the Veterans' Judicial Review Act, creating the United States Court of Appeals for Veterans Claims (CAVC), an independent Article I court with exclusive review of denials from the BVA.

Just as a veteran aggrieved by a final decision of the BVA can appeal to the CAVC, a veteran aggrieved by a final decision may appeal to the Federal Circuit, and ultimately, the United States Supreme Court. Appeals that are remanded

through the Federal court system are also statutorily required to receive “expeditious treatment.”

Despite the statutory requirements, appealed claims are often placed on the back burner in favor of initial claims. The 2012 BVA’s Report of the Chairman states that the average length of time between the filing of an appeal and a decision by the Board is 1,040 days. If a veteran subsequently appeals to the CAVC and the Federal Circuit, they might wait nearly twice as long.

Thus, you can imagine this Committee’s surprise to learn that appealed and remanded claims were not to be included in VA’s “Oldest Claim Initiative.” Although VA stated that their priority is to provide initial decisions to veterans who have been waiting for two years or more, many veterans with appealed or remanded claims have been waiting much longer than that.

Unfortunately, lengthy wait times are not the only problems currently plaguing the appeals system. In March 2013, the Federal Circuit issued a ruling stating that the VA acted unlawfully in 2011 when it promulgated a regulation that eliminated certain procedural and appellate rights for veterans appearing before the BVA, and ordered VA to show cause as to why sanctions should not be imposed. VA responded to that order on May 20, 2013, with a path forward to restore these rights to those veterans affected, and it is my hope that VA takes veterans’ due process and appellate rights more seriously in the future.

Our Nation’s veterans deserve an appellate system that promptly and accurately adjudicates claims that may have been incorrectly decided by VA initially, and that gives appropriate and timely consideration to remanded matters.

The veterans’ appellate process is a multi-tiered process that spans from the RO, to the BVA to the CAVC and beyond.

It is my hope that by bringing witnesses from each stage in the process together at today’s hearing, that we may better understand the role each plays in the process, and work together in a more efficient manner to process veterans’ appeals.

And, before I conclude my remarks, I want to highlight that the role of technology in the appeals process cannot be ignored. There has been much discussion on the need for seamless technological capabilities between DoD and VA.

Similarly, VA must ensure that the technology that it has developed, the Veterans Benefits Management System, or VBMS, is equipped to not only meet the needs of ROs, but also those needs of the BVA. Although the VBMS development team has met with BVA staff, we have heard conflicting reports as to how well the BVA’s needs have been received and incorporated into VBMS to date. I encourage VA to continue communications with the Board to ensure that VA’s technology upgrades also meet their needs.

With that, I would like to welcome our witnesses. Today’s scheduling was slightly compressed due to various events. Ordinarily, we would hold separate panels, with VA on one panel, and the Court on another. However, due to time considerations today we are seating a sole panel, and the order of the testimony is meant to be indicative of the appeals’ process.

We will start at the Regional Office and work up to the Court of Appeals for Veterans Claims.

First, we have Mr. Keith Wilson, the Director of the Roanoke Regional Office, is here on behalf of the Veterans Benefits Administration.

Then there is Ms. Laura Eskenazi (Ess-kuh-nas-ee), the Principal Deputy Vice Chairman, is here representing the Board of Veterans’ Appeals.

Finally, in terms of VA representation, we have Mr. Ronald S. Burke, Jr., Director of the Appeals Management Center in the National Capital Region Benefits Office.

Then, we will hear from Chief Judge Bruce Kasold, who is here representing the U.S. Court of Appeals for Veterans Claims.

We also have numerous statements for the record that have been submitted from various organizations, and I would like to thank all of those who submitted them for today’s hearing.

With those introductions complete, I am eager to hear from all of our witnesses on how we may improve the overall process for veterans’ appeals. Thank you all for being with us today.

I now yield to our Ranking Member for her opening statement.

Prepared Statement of Hon. Dina Titus

Thank you, Mr. Chairman, and thank you for holding this hearing on this important topic.

I would like to thank the witnesses for coming today to appear before the Subcommittee. The topic for this hearing focuses on the growing backlog of appeals pending with the VA and the Board of Veterans Appeals.

I routinely hear from veterans in Southern Nevada that are waiting far too long to receive a decision on their appeals. Improving the speed and efficiency of both the claims process and the appeals system will be a small step to recognize these men and women for their sacrifices.

We often hear from the VA about a transformation at the Department and it is important that we start to see results for our veterans. It was promising to hear one VA official suggest that the VA is at the "tipping point" of breaking the claims backlog. We all hope this is in fact the case; however the VA has not yet provided us with clear information to indicate that the move to VBMS and the new processing system will indeed provide all the gains in efficiency that have been promised.

I know that veterans in Las Vegas do not feel like we have reached a tipping point. Veterans in Nevada and four counties in California are served by the Reno Regional office. The average amount of time to complete a claim at the Reno VA Regional Office is 530 days, far from the 125 day goal set by Secretary Shinseki.

I will again request that the VA provide this Subcommittee with benchmarks for individual RO's as they move to meet the 125 day goal. I have repeatedly made this request and have not yet received this information from the VA. More needs to be done, and it needs to be done faster.

I am very encouraged that there has been progress made on this issue at some RO's. In the past 45 days, as a result of providing provisional ratings and clearing the inventory of old claims, the total number of pending claims has dropped by 44,000, and the number of backlogged claims has dropped by 74,000. I also applaud the VA for rolling out VBMS at all 56 VA Regional Offices more than 6 months ahead of their original goal.

I am pleased with this progress, but am concerned that an increased focus on claims has led to a decreased focus on veterans' appeals. VBA has surpassed a quarter million claims awaiting an appeal and BVA has 45,000 claims pending. The average length of an appeal completed in FY2012 was an astonishing 903 days. Currently 45% of cases sent to the BVA are referred back to the VBA for additional evidence or due to errors on the part of the VBA. To veterans waiting for an update on their appeal, this all adds up to an even longer wait for the benefits they deserve.

I am pleased to hear there has been progress in reducing avoidable remands but there is still room for improvement. However, what really concerns me is that assuming that VBA does work through the current backlog by 2015; this could lead to a significant number of appeals. By BVA's projections, the workload will more than double by FY17, from approximately 45,000 claims today to more than 102,000. This is further compounded by the fact that we have been made aware that VBMS is not ready for use by the BVA.

I strongly urge the VA to take the necessary steps to ensure that VBMS is also functional for the needs of the BVA as quickly as possible. It is counterproductive to send electronic files to the BVA in a format that will result in further delay for our veterans. The intent of this transformation from this Subcommittee's perspective was not to rob Peter to pay Paul. So let's not resolve the backlog at the VBA only to create a new one of appeals at the Appeals Management Center and the Board of Veterans Appeals.

I look forward to your testimony and hope to hear recommendations that are consistent with producing the best outcomes for our veterans appealing RO decisions.

Thank you, Mr. Chairman, and I yield back.

Prepared Statement of Laura H. Eskenazi

Good afternoon, Chairman Runyan, Ranking Member Titus, and Members of the Subcommittee. I am accompanied today by Mr. Ronald S. Burke, Jr., Director of the Appeals Management Center and the National Capital Region Benefits Office, Veterans Benefits Administration (VBA). Thank you for inviting me to speak to you today on the important topic of the Veterans benefits appeals system, and specifically what the Department of Veterans Affairs (VA) is doing to make the appellate process more timely and efficient for our Nation's Veterans and their families.

Overview of the Appellate System and the Role of the Board

The Veterans disability benefits appeals adjudication system, which includes all compensation claims, operates in two stages. The majority of the appellate process is conducted at the VBA regional office (RO) level before the case is transferred to

the Board of Veterans' Appeals (BVA or Board) for a final agency decision. An appeal is initiated at the VBA RO level by the Veteran filing a "Notice of Disagreement" (NOD) expressing dissatisfaction with one or more matters in the initial VBA decision. VBA then reviews the record, conducts any additional evidentiary development required by law, and issues a second decision called a "Statement of the Case" (SOC), which contains a summary of the evidence, a summary of the applicable laws and regulations, and a discussion of the reasons for the decision. If the Veteran is dissatisfied with the SOC, the Veteran may file a formal appeal at VBA, called a "Substantive Appeal," (VA Form 9). If there are any changes in the record, such as new evidence, VBA may need to issue one or more additional decisions, called a "Supplemental Statement of the Case." When VBA completes work on the appeal, VBA will certify and transfer the appeal to the Board for a final appellate decision. The Board handles appeals from various parts of VA, but 97 percent of the Board's workload comes from compensation and pension claims that were initially adjudicated by VBA. The remainder of appeals before the Board comes from other VA offices such as the National Cemetery Administration, the Veterans Health Administration (VHA), and VA's Office of General Counsel (OGC). The Board's mission, as defined by statute, is "to conduct hearings and dispose of appeals properly before the Board in a timely manner" while providing Veterans with "one review on appeal to the Secretary." In practical terms, this means that the Board has a very unique role in VA, in that it provides a "de novo" or "new" look at each case being appealed from the ROs, which includes a top-to-bottom review of every single piece of evidence in the record: evidence that the Veteran submits, evidence that VA has in its possession relevant to the claim, and evidence that VA is required to obtain on the Veteran's behalf. The decision made by the local RO receives no deference from the Board – in other words, the Board is not charged with assessing the RO's decision; rather, the Board takes an entirely new look at the record. Each decision of the Board must contain written findings of fact and conclusions of law, as well as reasons or basis for those findings and conclusions, on all material issues of fact and law presented. This de novo review is consistent with the pro-claimant protections of the benefits claims and appeals system, which includes a multitude of safeguards for the Veteran built in at each step of the process.

The Board's workload and output are substantial with case receipts of in fiscal year 2012 of 49,611 in fiscal year 2012, the Board issued 44,300 decisions, 28.4% of which were grants of benefits, and conducted 12,334 hearings. The Board's cycle time for fiscal year 2012 was 117 days, which represents the time from when an appeal is physically received at the Board until a decision is reached, excluding the time the case is with a Veterans Service Organization (VSO) representative for preparation of written argument. The Board is required by statute to consider appeals in docket order, which requires that the oldest appeals be worked first. Currently, the Board has a pending inventory of 45,487 appeals. The oldest appeal is not defined by the date that the appeal arrives at the Board – rather, the oldest appeal is defined by the date that the Veteran completed the appeal at the local level – sometimes long before the appeal reaches the Board's offices. This means that Veterans who have been waiting the longest are the first to receive action on their appeal from the Board.

The Board currently has over 300 staff counsel who are each required to produce an average of three decisions per week on an annual basis for 52 non-supervisory Veterans Law Judges and 12 supervisory Veterans Law Judges. Each non-supervisory Veterans Law Judge is, in turn, required to sign at least 752 decisions per year.

The amount of evidence associated with each appeal has been steadily rising over the years, as has the number of issues per appeal, which results in longer, more complex Board decisions explaining the reasons and bases for VA's ultimate decision. In fiscal year 2012, the average one-issue case included 2.13 binders of documentary evidence, which is up from 5 years ago in fiscal year 2008 when it was 1.64 binders of evidence for a one-issue case. Each binder of evidence is between 2–4 inches high, and does not include the evidence that is currently part of each Veteran's Virtual VA record.

The number of issues per case has also increased over the past decade. In fiscal year 2003, the number of issues the Board adjudicated in each of its decisions averaged 1.86 issues per case. In fiscal year 2012, the average number of issues adjudicated per Board decision rose to 2.43, resulting in a 30-percent increase in the number of issues decided per Board decision in less than 10 years.

This means that the Board is deciding more issues, and reviewing more evidence for each case it decides, than ever before. The Board looks forward to VA's movement to a fully electronic appeals adjudication system having efficiencies that will help VA to better handle this burgeoning workload. This system will not change the

fundamental statutory requirement that the Board fully review what is becoming an ever-growing amount of evidence and issues for each appeal.

The Board's decisions are also growing increasingly complex due to activity from the Court of Appeals for Veterans Claims and the Federal Circuit. The Board's position on the front lines with the Courts means that the Board has to adjust to an ever-changing legal landscape, drafting decisions that look like dense legal briefs, while at the same time drafting decisions that are understandable to the Veterans we serve.

Even with growing complexity, Veterans have enjoyed an unprecedented level of success at the Board in recent years. As with VBA, claims are denied only when there is no other option based upon the law and the evidence. If a claim cannot be granted and there is an indication that additional, favorable evidence may still be obtained, then the Board will remand the claim to preserve the Veteran's chance at a favorable outcome. In fiscal year 2012, the Board allowed more benefits for Veterans and denied fewer claims than ever before. Of the 44,300 appeals decided by the Board in fiscal year 2012, 28 percent were allowed and slightly less than 23 percent were denied. That same year, over 45 percent were remanded to ensure that all procedural protections have been provided, in terms of additional evidentiary development to hopefully provide a chance of allowing a benefit for the Veteran.

Challenges Resulting from Remands

Despite the success that has been achieved over the past several years, many challenges remain as we seek to reduce the pending inventory of appeals and increase efficiency within the process. Remands in particular remain a challenge that VA is aggressively addressing. By remanding a case, the Board sends the appeal to the Agency of Original Jurisdiction (AOJ), most typically the VBA's Appeals Management Center (AMC), for the completion of additional evidentiary development. Remands are directly tied to procedural protections built into the Veterans benefits appeals system to ensure that no stone is left unturned and that Veterans benefit from maximum development of the evidentiary record. Although remands add time to appeals adjudication, they are in large part the result of VA's efforts to do everything possible to get it right for the Veteran and ensure that no potentially favorable evidence is overlooked.

There are essentially two kinds of remands in the VA appeals system, those that are avoidable and those that are unavoidable. Avoidable remands are remands resulting from inadequate evidentiary development at the AOJ level before certification and transfer of the appeal to the Board. In other words, some deficiency in evidence gathering on the part of VA required the Board to remand the case to the AOJ. Unavoidable remands, however, are not the result of any mistake on the part of VA. Rather, these remands are a result of the pro-claimant open record, which allows development of new evidence up until the point that a final decision is signed and mailed to the Veteran. Unavoidable remands are often the result of additional development that VA must undertake as a result of the Veteran's identification of additional evidence after the appeal has been transferred to the Board, or the submission of new evidence by the Veteran, which in turn triggers additional development as a result of VA's statutory duty to assist. Unavoidable remands are also often the result of the Veteran's introduction of a new theory of entitlement for the first time at the Board level, which also requires evidentiary development.

Such remands are the result of significant procedural protections built into the Veterans benefits system, which can result in additional time needed to adjudicate appeals, but also ensures every opportunity to gather evidence favorable to the Veteran. Indeed, many remands are the result of VA's efforts to secure evidence to fairly decide the claim. Unavoidable remands in particular are the result of the unique nature of the Veterans benefits system, which allows for the submission of evidence throughout the VA appeals process. This open record system is virtually unparalleled as compared to other courts or areas of administrative law, and contributes significantly to delays in the system.

A large majority of remands in the system are unavoidable. As of June 2013, 64 percent of Board remands have been unavoidable and only 36 percent have been avoidable. Over the past several years, there has been a steady decline in the number of avoidable remands and a steady increase in the number of unavoidable remands. By comparison, in fiscal year 2005, when VA first began tracking this data, 60 percent of remands were avoidable and only 40 percent were unavoidable. This steady improvement is strong evidence that VA's continued efforts to reduce the number of avoidable remands are paying dividends for Veterans.

Although a large majority of remands in the VA appeals system are unavoidable, VA continues to take aggressive action to reduce the number of avoidable remands. Both VBA and the Board have implemented a Joint Training Initiative designed,

in large part, to reduce the number of avoidable remands. Training materials and presentations designed as part of this effort are crafted with input from both Board and VBA subject matter experts, and include feedback from VA's OGC. Many of the training materials produced as part of this effort are keyed to address the top reasons for remands and recent trends in Veterans' law.

The adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand. VA's statutory duty to assist Veterans in obtaining evidence needed to substantiate their claim requires that a medical examination and opinion be provided, unless the evidence already in the record is legally adequate to decide the claim. Such examinations are generally performed by VHA clinicians. To combat the challenge of remands for examinations and opinions, the Board has partnered with VHA's Office of Disability and Medical Assessment (DMA) in an effort to improve the compensation and pension examination process and enhance the quality of examination reports provided by VHA physicians. The Board has welcomed representatives from DMA to the Board's facility on numerous occasions over the past several years to discuss matters relating to VA examinations and develop better training modules for physicians. The goal of these training efforts is to produce examinations that are medically and legally adequate so that remand for supplemental medical examinations and opinions can be avoided.

VA also anticipates that full utilization of the Disability Benefits Questionnaire (DBQ) process will result in fewer remands due to inadequate medical examinations. DBQs have been specifically designed to directly address the requirements of the VA Schedule for Rating Disabilities, and ensure that all medical information needed to decide claims and appeals is elicited from the examiner. The Board continues to work with our partners at VHA and VBA to further refine the DBQs in line with legal requirements, and make them an even more effective tool in reducing the number of avoidable remands.

The cases that are being remanded by the Board to the AMC are being worked faster than ever. In 2009, remanded cases remained pending at the AMC for nearly 400 days before being recertified to the Board. That number has dropped to only 115 days pending today, a dramatic 71-percent decrease. If current trends continue as we anticipate, the number of days remands remain pending at the AMC will drop to below 100 by the end of the fiscal year. This represents a huge improvement in a very short time.

VA Initiatives to Improve the Appeals System

VA is actively pursuing several initiatives to further improve the appeals system and reduce wait times for Veterans. Among those efforts will be the full implementation of the Veterans Benefits Management System (VBMS) at each level of the appeals system, including the Board. VBMS, along with several other people, process, and technology initiatives, will help us eliminate the backlog. The Board has been working with our partners at VBA and VA's Office of Information and Technology (OIT) for over 3 years to define the Board's business requirements that will need to be programmed to maximize VBMS efficiency for appeals. These efforts are a continuation of the Board's long history of working with our VA partners on paperless appeals. Nearly all Board employees directly working appeals have completed initial VBMS training, and we anticipate that all Board staff will have VBMS access this summer.

VBMS will ensure that Veterans claims files are protected from damage or loss and are securely backed up. The VBMS system will also save considerable time and money currently spent mailing claims files back and forth between parts of VA, specifically between the Board and the various VA ROs. VBMS will also allow different offices in VA to work different claims at the same time, eliminating delays currently spent temporarily transferring claims files between different parts of VA and the down-time spent while another office works on a claim. Although VBMS will result in these and several other administrative efficiencies, it will not change VA's duty to assist the Veteran in the development of the evidentiary record, nor will it alter the Board's duty to perform a comprehensive de novo review of each and every piece of evidence in the record on appeal to render a fair decision. Whether the record is paper or electronic, the Board will still be obligated to look at every page in it to make sure that every favorable piece of evidence is identified and given due consideration.

The Board is also leveraging technology in several other ways. The Board has begun the process of scanning all new Board hearing transcripts, mail, and certain types of representative argument into Virtual VA to make the eventual transition to VBMS easier, while further saving both money and time needed to print documents and associate them with the paper claims file.

Both the Board and VBA have also converted to a virtual docket for scheduling Board hearings. The virtual docket system replaces a completely paper-based system for hearing scheduling that was often utilized very differently across different offices. The virtual docket system saves considerable administrative time associated with scheduling hearings, ensures uniformity in scheduling practices across various offices, and allows for greater scheduling transparency so that available hearing dates and times can be quickly identified by VA staff regardless of physical location.

The Board has also completed major technological upgrades to its video conference hearing equipment over the past several years. This includes the purchase of high-definition video equipment, a state-of-the-art digital audio recording system, and significantly increased video conference hearing capacity. As a result of these improvements, we have also expanded the video conferencing system for hearings to other strategic satellite sites in the continental United States, Puerto Rico, Guam, American Samoa, and the Philippines to support Veterans living in remote areas.

The Board is holding more video conference hearings than ever before to fully capitalize on the critical upgrades to its video conference hearing technology. Thus far in fiscal year 2013, slightly over half of the Board's hearings are being held by video conference. This is an increase from fiscal year 2012, where only 39 percent of the Board's hearings were held by video conference.

VA hopes to continue this trend toward greater use of video conference hearings, but current statutory restrictions prevent us from using this important technology to the fullest. That is why VA fully supports the passage of § 202 of the S.928, the "Claims Processing Improvement Act of 2013," that was recently introduced in the Senate by Chairman Sanders. Section 202 would allow for greater use of video conference hearings, would potentially decrease hearing wait times for Veterans, enhance efficiency within VA, and better focus Board resources toward issuing more final decisions.

The Board has historically been able to schedule video conference hearings more quickly than in-person hearings, saving valuable time in the appeals process for Veterans who elect this type of hearing. In fiscal year 2012, on average, video conference hearings were able to be held almost 100 days sooner than in-person hearings. Section 202 would allow both the Board and Veterans to capitalize on these time savings by giving the Board greater flexibility to schedule video conference hearings than is possible under the current statutory scheme.

Historical data also shows that there is no statistical difference in the ultimate disposition of appeals based on the type of hearing selected. Veterans who had video conference hearings had an allowance rate for their appeals that was virtually the same as Veterans who had in-person hearings, only Veterans who had video conference hearings were able to have their hearings scheduled much more quickly. Section 202 would, however, still afford Veterans who want an in-person hearing with the opportunity to specifically request one.

In short, § 202 would result in shorter hearing wait times, better focus Board resources on issuing more decisions, and provide maximum flexibility for both Veterans and VA, while fully utilizing recent technological improvements. VA, therefore, strongly endorses this proposal. In addition to the legislative proposal on video conference hearings, VA has included four other legislative proposals related to improving the appeals process in VA's FY 2014 budget submission and we appreciate Congress' continued consideration of those measures. In summary, those proposals are as follows: reduce the period of time for to file an initial appeal from one year to 180 days; clarify that a timely filed Substantive Appeal (VA Form 9) is a jurisdictional requirement for BVA review; simplify the content requirements of BVA decisions; alter the requirements for obtaining fees under the Equal Access to Justice Act (EAJA) to align such fees to an actual award of benefits for the Veteran.

The Board also played a key role in the VBA Appeals Design Team (discussed below), which looked at finding efficiencies in the appeals processing at the RO level. The Board's Chief Quality Review Officer was an active participant on that design team. As part of the pilot, the Board reviewed 50 appeals that had been through all facets of the pilot to assess the readiness of the appeals for certification to the Board for a final decision. The results were encouraging, as 80 percent of the cases presented to the Board in that pilot were deemed ready for certification, with only 20 percent being identified as requiring additional action. In addition to these efforts, the Board is also pursuing a lean six sigma study of how it produces appellate work in its offices to identify further efficiencies in processes, in order to speed up the decision drafting process.

Appeals Design Team Pilot Program

VBA and the Board have conducted an Appeals Design Team pilot, looking at ways to reduce the amount of time it takes to process appeals and improve customer

service and timeliness. Using a lean six sigma approach, initiatives were developed to improve quality, primarily through in-process reviews and the use of a certification checklist.

A key recommendation in the pilot is standardizing the Notice of Disagreement (NOD). The purpose of this standardization was to improve communication with the Veteran at the front-end of the appeals process. Also, the standardized form allows VBA staff to easily identify a submission as an NOD for ease, speed, and accuracy of processing. The use of the NOD form has been responsible for greatly lowering the amount of time needed to prepare a Statement of the Case and ultimately certify an appeal.

Because claims and appeals processors often must sort through lengthy statements that include both NODs and new disability claims, the standardized form facilitated more accurate and faster processing of NODs while significantly reducing the number of letters VA must otherwise send to an appellant to request clarification of the issue under appeal. To accommodate those filing claims online, the appeals form will be uploaded to eBenefits so that Veterans have a prescribed form to assist with the filing of their appeals.

In addition to standardizing the NOD, the Appeals Design Team tested the effectiveness of a local waiver form, allowing the local RO to expedite the certification of the Veteran's appeal to the Board. This recommendation had an extremely positive impact on certifications to the Board.

In addition, specific collaboration was undertaken with the VSOs to ensure we captured their best ideas and to guarantee cooperation from the onset. A member of the VSO community was, in fact, a member of the Appeals Design Team. As part of the ongoing improvements to the appeals process, Decision Review Officers and VSOs interact early on in the process, as we believe communication is key to appeals resolution at the earliest possible point.

VA's Recent Initiative to Address Old Claims

VBA's performance in the appeals process will not be affected by the recent initiative to address VA's oldest claims, nor will appeal rights be withheld for any claimant whose case is part of the initiative. For ready-to-rate cases in which all the evidence is available, full appeal rights will be provided as usual at the time of the decision. Provisional decisions will also be made based on the available evidence in the claims folder, which will allow VA to more quickly decide the oldest claims in the inventory and expedite delivery of benefits to claimants. In these cases, Veterans will be afforded full appeal rights no later than one year after the provisional decision or at an earlier point if the Veteran requests a final decision or if all outstanding evidence is received prior to the end of the 1-year provisional window.

As of June 13, 2013, we have reduced the number of claims over two years old that needed to be worked under this initiative from 62,180 at the beginning of the initiative on April 19, 2013, to 6,305 – a 90% reduction. We have also seen a 7.5% reduction in the number of claims pending between one and two years, from 210,714 to 194,925 claims.

Conclusion

VA is working aggressively to reduce the pending inventory of appeals in an increasingly complex legal landscape. New training efforts between the VBA, VHA, and the Board, together with full utilization of DBQs, will help to further reduce the number of avoidable remands. At the same time, efficiencies gained through the introduction of VBMS will serve to lessen the administrative burdens in the claims and appeals system to better focus resources on issuing decisions more quickly and accurately than ever before.

Lessons learned from the Appeals Design Team and increased use of video conferencing technology for Board hearings will add valuable efficiencies into the system and result in positive change for Veterans. However, for Veterans to achieve the maximum benefit from VA's significant investment in state-of-the-art video conferencing technology, full Congressional support of § 202 of the Veterans Claims Improvement Act of 2013 is needed.

This concludes my testimony. I would be happy to address any questions from Members of the Subcommittee.

Prepared Statement of Hon. Bruce E. Kasold

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before you today, and I commend the committee's effort in working to ensure that veterans receive decisions on their claims in the most accurate and efficient manner possible. My colleagues and I at the United States Court of Appeals for Veterans Claims are constantly striving to provide fair, comprehensive, and prompt judicial review of decisions appealed from the Board of Veterans' Appeals to the Court.

To this end, a little over five years ago, my predecessor, Chief Judge Greene, noted an ever increasing number of appeals being filed at the Court and requested authorization for two additional judges, bringing the total number of active judges to nine. I am happy to report that as of the end of last year, all nine positions are filled. It takes about one year for a judge to fully get up to speed, but we are in a great position to handle our current caseload. Of interest, the number of appeals filed last year dropped slightly from just under 4,000 in fiscal year (FY) 2011 to just under 3,700 in FY 2012. This is still a large number of appeals coming in – in fact 1,500 more per year than we were averaging 10 years ago. Last year the Court as a whole disposed of over 4,300 appeals, so I can proudly say that our number of appeals OUT exceeded the number coming IN by 700. Indeed, the Court remains one of the busiest federal appellate courts based on the numbers of appeals filed and decided per active judge. In addition to appeals, the Court receives petitions pursuant to its authority to issue extraordinary writs in aid of its jurisdiction under the All Writs Act, (28 U.S.C. § 1651(a)), and applications for representation fees and expenses authorized under the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412(d)). With nine judges on board and with our single-judge decision authority, I do not anticipate recalling more than one of our retired Senior Judges this year.

About five years ago the Court modified its procedures to require that most cases involving representation go through a staff conferencing process with one of our Central Legal Staff (CLS) attorneys. This requirement directs the appellant to identify the specific contested issues to counsel for the Secretary of VA, and then the parties participate in a conference conducted by a CLS attorney, where the issues are discussed and the parties attempt to come to an agreed resolution. On average, about 65–70% of our cases are conferenced, and of those, approximately 50% end up being resolved, generally with an agreement to remand the claim for additional development.

In trying to further reduce the average span of time it takes for resolution of an appeal, when I became Chief Judge I identified two main areas of un-programmed delay in our case processing. One was the time it took our Central Legal Staff to prepare case summary and research memoranda in advance of forwarding cases for judicial review, and the other was the time it took to decide cases once they were assigned for judicial review. I am pleased to state that with some administrative adjustments and hard work by all, we have significantly reduced the time it takes for most fully-briefed cases to get to chambers, from an average of almost 120 days to 30 days. We also have appreciably reduced the time from case assignment to decision by a judge, with most decisions being issued within 90 days of assignment to a judge. Panel cases, and cases stayed pending a panel decision are the prime exception.

But, litigation is time consuming. Once an appeal is filed, 60 days are allotted for the Secretary of VA to provide to the Court the Board decision being appealed, and to serve on the veteran the record upon which VA's decision was based. Time is built in for resolving any disputes as to the record. When an appellant is represented from the start, pre-briefing conferencing is ordered. If resolution is achieved through the pre-briefing conference process the median time from filing an appeal to issuance of an order effecting the agreed resolution is about six months. When resolution is not reached, the appellant then has another 30 to 60 days to file a written brief, the Secretary has 60 days to file a response brief, and the appellant has 14 days to file a reply. Then, the Secretary has 14 days to file the Record of Proceedings, which is in essence the distilled record that the parties contend is relevant to their arguments. In the best case scenario, in the sense that no delays or extensions have occurred, 245 days have already lapsed at this point. The briefs and Record of Proceedings are thereafter reviewed by CLS and prepared for transfer to chambers, which as I noted is now accomplished on average within 30 days, and a decision generally is rendered by a judge within 90 days thereafter.

We have examined whether the briefing process can be streamlined further, but key parties representing the Secretary and counsel for appellants have expressed their objection to shortening the time to prepare their briefs – which time, by the way, is not substantially different from the time provided in appeals to the other Federal appellate courts. Nevertheless, this is an area that I will continue to assess.

Also, in FY 2012, 44% of the appeals were filed by appellants without representation, but the number of cases where the appellant remained unrepresented at the

time of decision dropped to 27%. There is no specified time by which a pro se appellant may seek counsel, but when a pro se appellant finds representation, that appeal generally “re-starts” in the sense that it goes through the pre-briefing conferencing process or re-briefing is requested. The result often is additional time added for the processing of those types of appeals. Of further note, and of great impact, is the fact that over 5,000 motions for extensions of time to file a brief or take some other action were filed in FY 2012, about equally divided between appellants and the Secretary. If each motion constitutes a request for an additional 45 days of processing time, it is easy to see how the life span of an average appeal can grow significantly. This is another area that we have monitored closely and continuously discuss with our practitioners.

As mentioned earlier, panel decisions take longer. Any judge can send a case to panel so that complex, novel, or reasonably debatable issues can be resolved by panel. Additionally, all dispositive decisions are circulated among all of the judges prior to issuance. In the case of single-judge decisions, if two judges believe the case requires decision by a panel, it must be referred to a panel. This process helps ensure that single judges do not make decisions that should be the subject of precedential panel decisions. Further, once a single-judge decision is issued, either party may request reconsideration and/or panel review, and whenever a request for a panel decision is made, a panel of three judges will review the appeal. Thus, the Court’s rules permit single-judge decisions in an effort to promptly resolve cases, but safeguards exist to ensure that single-judge decisions are supported by existing precedent, and those safeguards add processing time.

Additionally, during the circulation of a draft opinion, there may be a call for consideration of the matter by the full Court when it is believed that the proposed opinion addresses issues of exceptional importance or creates a conflict in the Court’s jurisprudence that must be resolved.

Following a final decision of our Court, an additional appeal to the U.S. Court of Appeals for the Federal Circuit may be filed. The Federal Circuit has jurisdiction to review our decisions that interpret the law and regulations, but not those decisions that apply the law and regulations to the facts of a particular case. Finally, following review in the Federal Circuit, either party may seek review by the U.S. Supreme Court by filing a Petition for a Writ of Certiorari. The Supreme Court has considered a handful of our cases over the years. All of these procedural safeguards can add to the processing time of an appeal.

Relevant to today’s hearing topic, over the past several years my Chief Judge predecessor and I have testified and advocated that Congress should establish a commission to evaluate the process of appellate review of veterans benefits decisions and to make recommendations on how to improve that system.

Our current system of judicial review of veterans benefits is unique with that second layer of appellate court review as a matter of right before one may seek review by the U.S. Supreme Court. That structure may have been prudent when the Court was in its infancy, but now, with 25 years of veterans jurisprudence, it seems time to consider the added value of the second layer of federal appellate review. That added layer comes at a cost to the system as a whole. Although each tier of review affords veterans another “bite at the apple” so to speak, which may be desirable to one who has been unsuccessful, that added level of review also adds delay to the entire process before finality is reached. The delay reaches not only the particular veteran in the case on appeal, but all pending cases that may be impacted by that decision.

Is the added layer adding value? In the words of Supreme Court Justice Robert H. Jackson: “Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.” Thus, I continue to recommend that a commission be appointed to critically review the costs and benefits of the current two-tiered system of judicial appellate review by right. Such an independent commission might identify beneficial changes to the current appellate structure that could result in reduced time that veterans wait to have their claims finally and fairly decided.

In closing, on behalf of the judges and staff of the Court, I express my appreciation for your past and continued support, and for the opportunity to provide this testimony today.

Executive Summary

- For the first time ever the Court is fully staffed with nine active Judges. I anticipate recalling only one retired Senior Judge to service this year.

- In FY 2012 the Court received 3,649 appeals and disposed of 4,355. The Court is one of the busiest federal appellate courts based on the number of appeals filed and decided per judge. We are maintaining our productivity through the tireless effort and focus of our entire Court's staff.
- The Court continues to evaluate and modify its procedures to streamline the judicial review process to the greatest extent possible. To this end, our pre-briefing staff conference process has been extremely successful in bringing the appellants and the Secretary together to work out mutual resolutions of many appeals. On average, about 65–70% of the Court's appeals are conferenced, and of those, approximately 50% end up being resolved by agreement of the parties. The Court has also made administrative adjustments to assist chambers in providing prompt judicial review of fully briefed cases, and worked with our central legal staff attorneys to streamline their case review process. These efforts have gained efficiency and cut days out of procedural development of claims, while preserving for each veteran who appeals to the Court the right to a full and fair decision.
- Despite the Court's efforts to streamline its appellate review, the bottom line is that litigation is time consuming, and affording parties due process adds to the overall wait for decisions on appeals.
- The Court continues to encourage appointment of a commission to evaluate the costs and benefits of the unique three-tiered federal appellate review system we have for veterans benefits decisions.

Statements For The Record

PROFESSOR MICHAEL P. ALLEN

Chairman Runyan, Ranking Member Titus, and Members of the Subcommittee:

Thank you for the invitation to submit this Statement in connection with the Subcommittee's hearing concerning: "*Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims.*" It is a distinct honor to have been asked to provide some views about this incredibly important issue for the men and women who have answered the call to serve the nation.

I am a Professor of Law at Stetson University College of Law in Gulfport, Florida. In addition to serving as a full-time faculty member, I am also Stetson's Associate Dean for Faculty Development and Strategic Initiatives and the Director of the College of Law's Veterans Law Institute. For the past eight years, I have had the pleasure of studying the existing system for reviewing veterans' benefits determinations at both the administrative and the judicial levels. In addition to teaching in the area, I have had the pleasure of testifying before the United States Senate Committee on Veterans' Affairs, participating in the House of Representatives Veterans' Affairs "Claims Summit: 2010," speaking to four judicial conferences of the United States Court of Appeals for Veterans Claims, participating in the judicial conference of the United States Court of Appeals for the Federal Circuit, and addressing numerous veterans groups across the country. I have also written a number of scholarly articles concerning veterans law.¹

I applaud the Subcommittee for addressing the serious issues that are implicated by the delays associated with the review of veterans' benefits decisions. There is no question that veterans and other claimants face significant delays in the review of decisions denying their claims. Such delays have real world effects on people's lives and also run the risk of undermining public confidence in the system as a whole. Anyone familiar with this area of law and policy has heard about the "hamster

¹Michael P. Allen, *Veterans' Benefits Law 2010–2013: Summary, Synthesis, and Suggestions*, — VET. L. REV. — (forthcoming 2013–2014); Michael P. Allen, *Commentary on Three cases from the Federal Circuit and the Court of Appeals for Veterans Claims as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits*, 5 VET. L. REV. 136 (2013) (hereafter "Allen, Commentary"); Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501 (2011) (hereafter "Allen, Due Process"); Michael P. Allen, *The Law of Veterans' Benefits 2008–2010: Significant Developments, Trends, and A Glimpse into the Future*, 3 VET. L. REV. 1 (2011); Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361 (2009) (hereafter "Allen, Legislative Commission"); Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM 483 (2007).

wheel” on which many veterans find themselves.² While the term specifically refers to the process by which veterans’ claims bounce from one level of the system to another and back again through a series of remands,³ for now my point is more generic. Any system in which a common visual metaphor is of someone trapped in a mechanism in which they run and run but go nowhere is a system that has a serious problem to address. Fundamentally that is what the Subcommittee is addressing and it is unquestionably important.

There are many groups and individuals who have intimate knowledge of the working of the system by which benefits are awarded and reviews of denials are accomplished. Representatives of the United States Department of Veterans Affairs (VA), the Board of Veterans’ Appeals (Board), Veterans Service Organizations, and the private bar representing claimants all bring expertise to the table about the issue on which the Subcommittee is focused. I do not pretend to hold myself out as having the “on-the-ground” level of knowledge as these groups and individuals have. I have no doubt that their statements to the Subcommittee will provide useful assessments and suggestions.

To be clear, my goal is not to duplicate the insights of the various groups I have highlighted above. Rather, I seek to provide a broader perspective on some of the systemic causes of delay in the system as well as some potential approaches for reducing the delay. My hope is that such a perspective will help those considering this issue to step back to see the forest instead of merely considering the trees. As I will explain below, I have come to believe that only a global assessment of the current system with real participation by representatives of all the relevant constituencies will affect long-term and sustainable improvements in the system.

This Statement proceeds as follows. In Section I (at pages 3–10), I provide a general (and basic) overview of the current system by which veterans’ benefits are awarded and reviewed. Of course, the Members of the Subcommittee are well aware of this structure. I include this discussion because I believe it is critical to reflect on the rather complex structure that is in place because that structure is one of the causes of delay. In other words, because those of us who work in the area of veterans law are so familiar with the structure by which benefits are awarded, we can often forget how unique (and complex) that structure actually is.

Section II (at pages 10–15) draws on this discussion of the veterans’ benefits system to highlight the significant causes of delays in appellate review of benefit determinations. As that discussion illustrates, the problem of delay may be more complex than one would imagine in part because many of the causes of delay stem from aspects of the current system that, in the abstract, are meant to protect veterans in the process. Thus, one needs to confront the possibility that efforts undertaken to help veterans in connection with their receipt of benefits could have negative consequences.

Section III (at pages 16–23) provides some suggestions for possible reductions in these delays. As that discussion makes clear, I strongly believe that the most likely means of achieving real reductions in such delays lies in the creation of a Commission or other body to consider the system from beginning to end. Short of such comprehensive action, Section III describes more modest, although not necessarily uncontroversial, steps Congress could take to reduce delays caused by the matters described in Section II. Finally, Section IV (at page 24) sets out a brief conclusion.

I. The Current System in Context

This Section sets the stage for the substantive discussion of the causes of delays in appeals of benefits matters as well as some potential solutions for that issue. It first considers the structure of the current system by which benefits are awarded. It then briefly highlights the workload in the system.

Structure of Current System

Until 1988, there was effectively no judicial review of administrative determinations concerning the benefits to which veterans and their spouses and dependants might be entitled under relevant law. As the Supreme Court of the United States noted (quoting a congressional report), the VA operated in “splendid isolation.”⁴

² See, e.g., *Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting) (discussing the “hamster-wheel reputation of veterans law”).

³ I discuss remands in more detail at several points in this Statement. For an excellent discussion of the issue of remands I suggest James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV. 113 (2009).

⁴ *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100–963, pt. 1, p. 10 (1988)).

This state of affairs changed with the passage of the Veterans' Judicial Review Act of 1988 (the "VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). The centerpiece of the VJRA was the creation of what is today the CAVC.

In order to assess the current state of appellate review of veterans' benefits determinations, both administrative and judicial, it is useful to step back and consider a high-level overview of the system in place under the VJRA. Because the Subcommittee already has a deep understanding of these matters, what follows is a general outline of what is a far more detailed system.

A veteran wishing to receive a benefit to which she believes she is entitled begins the process by submitting an application with one of the VA's regional offices (RO).⁵ There is no time limit within which a veteran must submit a claim for benefits. In other words, there is nothing like a statute of limitations that is a familiar part of more traditional civil litigation. If the veteran is satisfied with the benefits awarded, the process is at an end. However, there are a number of reasons why the veteran may be dissatisfied with the RO's decision.⁶

When the veteran is dissatisfied with the RO's decision, she has the option to pursue an appeal within the VA by filing a "Notice of Disagreement" (NOD) with the RO. The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC) setting forth the bases of the decision being challenged. If the veteran wishes to pursue her appeal after receiving the SOC, she must file VA-Form 9 with the RO indicating her desire that the appeal be considered by the Board.⁷

The Board bases its decision "on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation." See 38 U.S.C. § 7104(a). In addition to the material developed at the RO, the Board may also conduct personal hearings with the veteran at which new evidence may be added to the record. In other words, the Board's "appellate process" is far more solicitous in terms of accepting new evidence than is most appellate processes. A final Board decision concludes the administrative process.

If a veteran is dissatisfied with a final Board decision, she may elect to appeal that decision to the CAVC, which has exclusive jurisdiction to review such matters. The Secretary may not appeal an adverse Board decision. See 38 U.S.C. § 7252(a). Congress created the CAVC under its Article I powers. See 38 U.S.C. § 7251. The CAVC is comprised of judges appointed by the President with the advice and consent of the Senate to serve fifteen-year terms. See 38 U.S.C. § 7251(a), (b), (c). The CAVC has the "power to affirm, modify or reverse a decision of the Board or to remand the matter, as appropriate." See 38 U.S.C. § 7252(a). The CAVC is an appellate body that Congress specifically precluded from making factual determinations. See 38 U.S.C. § 7261(c). The CAVC has ruled that its jurisdiction is limited to denial of (or other dissatisfaction with) individual claims determinations. Specifically, the CAVC has held that it is without power to adjudicate class actions or other aggregate litigation concerning more generic issues that may affect groups of veterans.⁸

Any aggrieved party may appeal a final decision of the CAVC to the United States Court of Appeals for the Federal Circuit (Federal Circuit). See 38 U.S.C. § 7292. Review of Federal Circuit decisions is available by writ of certiorari in the Supreme Court. See 28 U.S.C. § 1254 (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals). Review in these Article III courts is limited by statute. Specifically, in the absence of a constitutional issue, the Federal Circuit may review only legal questions; it specifically is precluded from ruling on a factual determination or on the application of law to the facts in a particular case. See 38 U.S.C. § 7292(d)(2).

⁵ There are a number of benefits to which veterans and other claimants may be entitled based on military service. These benefits have their genesis in Title 38 of the United States Code. One of the most important types of benefits is disability compensation based on service-connected disabilities. By and large it is such service-connection disability compensation on which I will focus in this Statement.

⁶ For example, the veteran might have been denied a particular benefit, been dissatisfied with the effective date of the benefit awarded, or disagree with the rating assigned to a particular benefit.

⁷ Congress provided that veterans are entitled to "one appeal to the secretary [of the Department of Veterans Appeals]" when denied benefits. See 38 U.S.C. § 7104(a). That appeal in actuality is taken to the Board.

⁸ See, e.g., *American Legion v. Nicholson*, 21 Vet. App. 1 (2007) (en banc) (holding that court lacked jurisdiction to adjudicate claims brought by an organization as opposed to an individual veteran); *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991) (rejecting contention that court had the authority to adjudicate class actions).

Figure A summarizes the current procedures for considering challenges to the determination of entitlement to veterans' benefits:

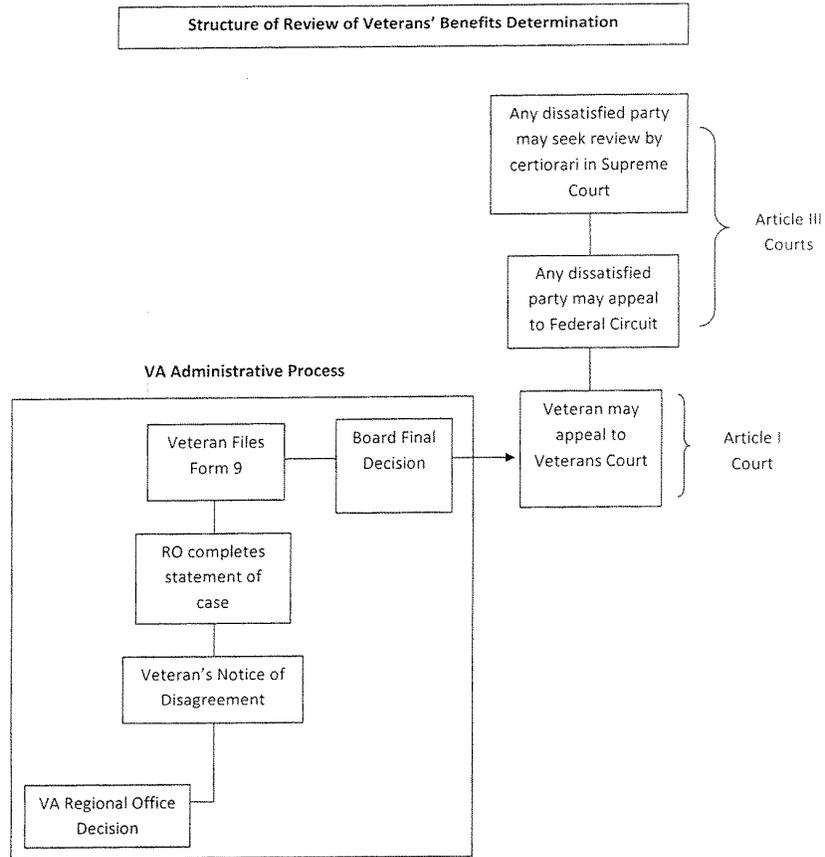


Fig. A

Something that is often overlooked when considering the current system by which veterans' benefits are awarded and such decisions are reviewed is that the system was not one designed from beginning to end at the same time. Rather, it is the product of the addition of judicial review on top of the pre-existing administrative system through the VJRA. In other words, the two parts of the current system – administrative and judicial – were simply grafted together in the late 1980s. Moreover, as mentioned above, the judicial review process itself is unique in the way in which the various judicial actors interact with one another. The bottom line is that it is not surprising that the very structure of the system can lead to delays in the processing and review of claims and appeals because the various parts of the system were not consciously designed to in the most efficient manner.

The administrative portion of the process from the filing of an application for benefits through consideration of an appeal by the Board is meant to be one that is non-adversarial and pro-claimant.⁹ The Supreme Court recently reiterated that Congress has made clear its intention that the administrative process is meant to be something radically different from a traditional adversarial process of litigation.¹⁰ For example:

- The VA is required to provide certain notices to claimants concerning what must be done to establish an entitlement to benefits. Such notice includes “any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.”¹¹
- Significantly, the VA has a statutory duty to assist claimants in developing evidence to establish their claims.¹²
- As mentioned earlier, there is no statute of limitations to file an application seeking benefits based on a service-connected disability.¹³

See generally, Henderson.

- Principles of res judicata have far less purchase in the administrative system than they do in general civil litigation because veterans seeking to revisit rejected claims have the ability to reopen claims based on the submission of “new and material evidence”¹⁴ or to attack the earlier decision by alleging that it was the product of “clear and unmistakable error.”¹⁵
- Whenever positive and negative evidence on a material issue is roughly equal, the VA is required to give to the veteran the “benefit of the doubt” with respect to proof of that issue.¹⁶
- The VA is required to “sympathetically read” a veteran’s claim documents.¹⁷
- In terms of statutory interpretation, the Supreme Court has adopted a “rule that interpretative doubt is to be resolved in the veteran’s favor.”¹⁸

The upshot of these statutory factors is that the administrative process is quite different from what one is used to in the more traditional adversary process. However, a more traditional adversary process is precisely what one finds when one appeals from an administrative determination to the judiciary process. When one reaches the CAVC and thereafter the Federal Circuit, the landscape is one that would be familiar to any lawyer – a traditional American adversarial process. My point here is merely that the current process of appellate review is a very odd one.

A final important consideration concerning the current structure of the veterans' benefits system is the role of lawyers in terms of representing claimants. For much

⁹For a more comprehensive discussion of the non-adversarial features of the administrative process, see Allen, *Due Process*, *supra* note 1, at 507–511; Rory R. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VET. L. REV. 77, 83–92 (2010).

¹⁰*Henderson v. Shinseki*, 131 S. Ct. 1197, 1200–07 (2011).

¹¹38 U.S.C. § 5103(a); see also 38 U.S.C. § 3.159(b) (adopting regulations implementing the statutory duty to assist).

¹²38 U.S.C. § 5103A.

¹³

¹⁴38 U.S.C. § 5108.

¹⁵38 U.S.C. §§ 5109A, 7111. To establish clear and unmistakable error in a decision, which can be done after the time to appeal has passed, the veteran must show that (1) the decision was incorrect because either the facts known at the time were not before the adjudicator or the law then in effect was applied incorrectly, and (2) the outcome would have been manifestly different if that error had not been made. *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc).

¹⁶38 U.S.C. § 5107(b)). The classic CAVC case on the benefit of the doubt doctrine is *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

¹⁷*See e.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1359–60 (Fed. Cir. 2009); *Comer v. Peake*, 552 F.3d 1362, 1369–70 (Fed. Cir. 2009); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

¹⁸*Brown v. Gardner*, 513 U.S. 115, 118 (1994).

of the history of the United States, there was a limited role for lawyers in the veterans' benefits process. To begin with, it was not until the enactment of the VJRA in 1988 that there was judicial review (and judges are lawyers after all) of benefits determinations.¹⁹ And it took until 2006 for Congress to allow lawyers charging a fee to represent claimants prior to a final Board decision.²⁰ Thus, while the nation's commitment to providing benefits to its veterans is not new, the integration of lawyers in a meaningful way into that system is still in its infancy. There is no question that the integration of lawyers into a non-adversarial process has been a challenge and that challenge has caused some delay in the process of administrative appellate adjudication.

Workload in the System

Before leaving the general description of the structure of the veterans' benefits system, one should not discount the reality that every stage in the process the current system operates under a staggering workload. Both this Subcommittee and its counterpart in the Senate have held numerous hearings over the past few years addressing this very real problem. There is no need here to dwell upon the statistics at the various adjudicatory levels in the process. For present purposes, the summary below is sufficient to establish that the system is operating with what can only be described as crushing numbers of claims and appeals:

Matters Before the Board

For fiscal year 2011, the Board physically received 47,763 appeals.²¹ During this same period, the Board disposed of 48,588 appeals.²² Finally of note, during fiscal year 2011, there were 122,663 NODs filed concerning RO decisions.²³

Matters Before the CAVC

The most recent statistics available concerning the CAVC's workload are for fiscal year 2011, from October 1, 2010 to September 30, 2011.²⁴ During this period, there were 4,086 appeals and petitions filed with the court.²⁵ The workload of the court is even greater when one considers dispositions. In fiscal year 2011, there were 7,562 dispositions of one form or another constituting 4,620 appeals, 167 petitions, 2,517 applications under the EAJA,²⁶ and 258 requests for reconsideration or panel review.²⁷ In terms of how those decisions were rendered, the court reported the following:²⁸

- 4,742 matters were resolved by the Clerk of Court;
- 2,661 matters were resolved by a single judge;
- 149 matters were resolved by a panel; and
- 10 matters were resolved by the court sitting en banc.

Matters Before the Federal Circuit

In fiscal year 2012 (October 1, 2011 to September 30, 2012), the most recent period for which statistics are available, there were 189 appeals filed in the Federal Circuit originating in the CAVC.²⁹ This accounts for approximately 14% of the matters filed at the Federal Circuit. During this same period, the court resolved 193 matters originating in the CAVC, also amounting to approximately 14% of terminations.³⁰

¹⁹ Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

²⁰ See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, tit. I, § 101(h), 120 Stat. 3403, 3408.

²¹ See Board of Veterans' Appeals, Report of the Chairman, Fiscal Year 2011, at 15 available at <http://www.bva.va.gov/docs/Chairmans—Annual—Rpts/BVA2011AR.pdf>.

²² *Id.* at 21.

²³ *Id.* at 20.

²⁴ See Annual Report, United States Court of Appeals for Veterans Claims, October 1, 2010 to September 30, 2011 (Fiscal Year 2011), available at <http://www.uscourts.cavc.gov/documents/FY—2011—Annual—Report—FINAL—Feb—29—2012—1PM—.pdf>.

²⁵ *Id.* There were 3,948 appeals and 137 petitions filed. The pro se filing rate remains high with 54% of appeals and 61% of petitions being filed by pro se litigants. *Id.*

²⁶ EAJA refers to the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

²⁷ CAVC 2011 Annual Report, *supra* note 23. In terms of the pro se rate at disposition, 24% or appellants in appeals and 50% of petitioners for petitions remained pro se. *Id.*

²⁸ All of the statistics presented here are from the 2011 Annual Report. *Id.*

²⁹ Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2012, available at <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Appels—Filed—Terminated—and—Pending—2012—REV.pdf>.

³⁰ *Id.*

Having described the current structure of appellate review of veterans' benefits determinations and well as the workload of the system, this Statement now turns to the causes of delay in that system and some possible approaches to reducing that delay.

II. Some Thoughts About the Causes of Delays in Resolution of Appeals

The previous Section described the current structure of the system by which veterans' benefits are awarded and reviewed. The purpose of that discussion was to remind us all of the unique nature of that system. In this Section, I build on that discussion with a focus on some of the major, systemic causes of the delays experienced by claimants in the review of benefit claims. I highlight four such systemic causes of delay, causes that in my view are often overlooked in the discussion. Those four areas are: (1) Congress' amazing generosity to veterans and their families; (2) the ad hoc development of the veterans' benefits system that led to its current structure; (3) the wide array of procedural protections provided to veterans; and (4) the complex nature of the law underling the provision of veterans' benefits.

Before turning to a discussion of these major causes of delay, two overarching points are important to note. First, I wish to note that I do not believe that anyone involved in the process by which veterans seek and contest denials of benefits intentionally causes delay. In other words, I firmly believe that every part of the system has as its goal the prompt provision of benefits to those claimants entitled to receive them. This is not a situation in which we have "bad actors" to root out.

Second, when one considers the causes of delay I have identified, it should be clear that so long as the goal of providing every possible advantage to veterans remains operative, delays in adjudication are going to be inevitable. When one provides a breathtakingly broad range of benefits to a group provided extraordinary procedural protections and those benefits are administered by a giant bureaucracy, the process of receiving benefits will be long in any objective sense. This is not to say that the current delays the Subcommittee is considering are acceptable. It is just to make clear that there is a cost to the positive attributes of the system and that cost is some measure of delay.

With these caveats clearly presented, the balance of this Section considers in some additional detail the causes of delay I have listed above. Section III turns to potential approaches to dealing with that delay.

The Generosity of Congress

There is nearly universal agreement that the nation owes an incredible debt of gratitude to the men and women who choose (or who were selected to) serve in the armed forces. They make (or made) it possible for the entire country to live the extraordinary lives we get to live. And Congress has recognized the service these men and women have provided by providing an extraordinarily broad range of benefits to which they are entitled. These benefits include disability compensation, life insurance, home loans, and educational benefits among many others. And while I understand that the current focus of the Subcommittee is on the appellate process, the reality is that the more initial claims that are made the more appeals will follow as a matter of logic.

In my estimation, Congress' decision to make the broad range of benefits to veterans and their families is the right thing to do as a matter of policy. But that correct and honorable decision comes with a cost. That cost is the necessity to have a system by which those benefits are administered.

In addition to the range of benefits, Congress' generosity has extended to the time within such benefits may be sought. While some benefits have a time limit, one of the most significant benefits does not – service-connected disability compensation. For that benefit, for example, a veteran may seek compensation for a service-connected disability at any time. The result is certainly pro-claimant but the resolution of claims filed twenty, thirty or even forty years after a person's service can be time-consuming.

Finally, the management of the wide array benefits Congress has made available to veterans and their families requires by its very nature a large bureaucracy. No matter how one feels about so-called "big government," it requires a great many people to review millions of claims for benefits submitted each year and many more to provide the review of those initial decisions. There no doubt that there are inefficiencies in the VA, a point I will return to below. However, for now the point is that a cause of some of the problems the Subcommittee is considering is related to the commitment of Congress to veterans and the corresponding creation of a process by which that commitment is translated into tangible outcomes.

The Ad Hoc Development of the Veterans' Benefits System

Another significant cause of the delays in resolution of veterans' appeals of benefits denials can be traced to the ad hoc development of the benefits' system itself and the various consequences that flow from that development. As one will recall from the summary of the system set out in Section I above, the system we have today is the result of additions over a long period of time. It is as if one had built a house with many additions over the years but there was no conscious planning of what the residence should ultimately look like. The structure works as a house but not in the way in which it would have had it been planned at a single time. In this sub-section, I briefly highlight some of the way in which the ad hoc development of the benefits' system contributes to current delays.

- The system includes two dramatically different segments: a non-adversarial administrative structure onto which a traditional judicial system has been grafted. Moreover, the engrafting of that judicial superstructure came only after many years in which the administrative structure existed in isolation. This part of the system's development causes delay in several respects.
 - First, there is a disconnect between the two parts of the system for veterans as they move from the non-adversarial process to the traditionally adversarial judicial process. This transition can be a difficult one for unrepresented veterans who have grown accustomed to being assisted in the development of their claims. The transition adds time to the resolution of cases reaching this level of the system.
 - Second, even after a quarter-century of the presence of courts in the process, it does not appear that all of the actors in the administrative system have fully accepted judicial review. Some of this resistance may be conscious. But leaving that aside, it also seems that even after twenty-five years there is not a sufficiently well-developed means by which legal ruling are communicated to front line adjudicators in a timely and understandable manner. The result of this state of affairs is that errors occur that could be avoided and those errors will also lead to likely needless remands to apply the correct legal rule. These remands in turn add to the length of time it takes for an appeal of an administrative decision to be fully resolved based on the correct legal principles.
 - Third, even if there were not resistance (conscious or unconscious) to the imposition of judicial review, the complex body of law imposed on the administrative process is being implemented in the first instance by non-lawyers. This reality means that errors in adjudications are extremely likely to occur, requiring correction on appeal.
- Another source of delay inherent in the structure of the system as it currently stands can be tied to certain requirements Congress has imposed on various actors in the process.
 - First, Congress made the decision to create the CAVC as an appellate body and specifically precluded that body from making factual determinations. See, e.g., 38 U.S.C. § 7261(c). The decision to have judicial review of veterans' benefits decisions vested in an appellate tribunal and the corresponding restriction on making factual determinations have an important consequence. The CAVC will often find an error the Board has committed but conclude that the proper remedy is to remand the matter so that the Board may conduct the appropriate fact-related exercise. In other words, this structural feature of the system is a critical component of the so-called hamster wheel on which so many veterans find themselves.
 - Second, and related to the first point, Congress has required that the Board's decisions contain: "a written statement of the Board's findings and conclusions, and the reasons and bases for those findings and conclusions, on all material issues of fact or law presented on the record. . . ." 38 U.S.C. § 7104(d)(1). The rationale for doing this is two-fold. We want the veteran to understand why the Board has reached its conclusions. We also want to make sure that a court can meaningfully review the Board's actions. However, this requirement is also a component of the hamster wheel because so-called "reasons and bases" errors are extraordinarily common. When the CAVC determines that there is a lack of reasons or bases (or as is also common, the parties on appeal agree that the Board's decision lacks a sufficient statement of reasons and bases), the only recourse is a remand. At that point it seems quite likely that the Board will issue another decision reaching the same result but with more explanation. That, in turn, will lead to another appeal to the CAVC. The wheel continues to turn.
 - Third, Congress made a determination to include two-levels of as-of-right judicial review of administrative decisions. As described above, a dissatisfied claimant has a right to appeal a final Board decision to the CAVC. Either party then has a right of appeal to the Federal Circuit. As far as I am aware, this is the only exam-

ple in federal practice of two levels of as-of-right appellate review. There is no question that the inclusion of the Federal Circuit in the chain of review adds to delays in the appellate process. Most obviously, in cases appealed to that court the appellate process is lengthened by definition as the court considers the appeal. However, more systemically the presence of an additional layer of review contributes to delay by making the law less stable. Of course, this recognition does not mean that having the Federal Circuit as a part of the process is necessarily a bad thing. If there is some goal that the court's inclusion supports – for example a strong concern for error correction plain and simple – having two levels of review might be appropriate. But with that extra layer of review necessarily comes delay.

- Another aspect of the ad hoc development of the current system that contributes to delay concerns the presence of lawyers in the administrative system. As described above, Congress has provided that a claimant may retain a lawyer for a fee as soon as he or she receives an initial RO decision on a claim. This was a significant change in the system which had historically disfavored the assistance of counsel. As I will discuss in Section III below, I actually believe that the greater use of lawyers in the administrative system has the potential to reduce delays in the appellate process. However, that potential is being undercut by a resistance to counsel by administrative adjudicators at all levels of the system. The result of such resistance means not only that the reductions in delays that could accompany the greater introduction of lawyers in the system are not being realized, but ironically greater delays are being introduced as administrative adjudicators and counsel engage in peripheral battles over the presence of lawyers themselves.

Procedural Protections Provided Claimants

As I have mentioned above Congress has been quite generous to veterans in terms of the benefits they are entitled to receive. I've explained how that generosity itself is, ironically, a part of the delays in receipt of benefits. A related concept is that in addition to being generous in the types of benefits available, Congress has also been generous in providing procedural protections to claimants in the system.³¹ Congress has provided means for veterans to have multiple hearings at the various levels of the process and to introduce new evidence well after traditional processes would preclude such an action. Moreover, as described in Section I, Congress has mandated that veterans be provided with notice and assistance in the administrative process in order to implement the non-adversarial, pro-claimant aspect of the system.

These procedural protections are important to veterans. However, with any additional layer of procedure comes a corresponding period of delay. For example, with each additional hearing comes time to prepare, have the hearing, and eventually render a decision. And with the duties of notice and assistance, a finding that such a duty has not been complied with will almost always lead to a remand. None of this is to say that the procedural protections provided to veterans are a bad thing. It is simply to note that the more procedure one affords, the longer a process will take from start to finish.

Legal Complexity

A final cause of delays in the administrative system concerns the legal complexity of the law in the area of veterans' benefits. As Judge Lance of the CVAC recently wrote, "[t]here is an unfortunate – and not entirely unfounded – belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year."³² If Judge Lance is correct – and I believe he is – delays are going to inevitably result. And it is worth noting that if the law in this area is becoming too complex for RO adjudicators to apply, how much more of a problem is that for claimants who may not have the benefit of legal counsel or assistance by a Veterans Service Organization.

Delays flow from legal complexity in at least two respects. First, it simply takes time for a legal ruling issued by the Federal Circuit or the CAVC to be communicated to adjudicators in a manner that allows it to be applied. Second, even when communicated, the complexity of legal doctrine is such that errors are inevitably a part of the process. Those errors need to be corrected on appeal at some point and

³¹The Federal Circuit has also held that applicants for veterans' benefits have a property interest in those benefits such that the Constitution's Due Process Claim applies. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). This Statement does not consider the constitutional issues but rather only the various procedural protection Congress (or the VA) has provided. I have discussed the constitutional issues more directly in Allen, *Due Process*, *supra* note 1.

³²*Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring in the judgment).

these corrections often lead to remands. Those remands, in turn, can lead to further appeals lengthening the time to resolution of claims.

As with many of the causes of delay I have discussed, there is a positive attribute behind the scenes. The introduction of judicial review has unquestionable led to the legal complexity that is a part of the increased delay in resolving claims. But judicial review has also brought great benefits to the system of veterans' benefits. I have discussed these benefits in other venues and will not repeat them here.³³ My point at this juncture is that one has to recognize that while extensive delays in resolving claims is unquestionably not a good thing, some level of delay is part and parcel of alterations to the system that have been a good thing.

This Section has discussed some of the less obvious causes of delays in the consideration of appeals of veterans' benefits claims. A common theme of that discussion has been that many of the reasons for delays in adjudication of benefits' claims flow from aspects of the system that are positive in the abstract. Of course not all do, but the reality that there is a mix of good and bad here making crafting solutions for the problem even more complex than it otherwise would be. Section III considers some possible means to approach the problem of delays.

III. Some Thoughts About Possible Solutions for the Delays in Resolution of Appeals

This Section of my Statement turns to potential solutions to the delays in adjudication of appeals. Before describing how I will proceed, I wish to mention two preliminary points in connection with this discussion. First, I understand that the VA is in the process of computerizing its claims files. I believe that this effort will, in the long term, reduce delays in adjudication. But it is not a magic bullet. It is one part of the process. And for it to be successful, the VA must ensure that it has considered not only how digitization of its claims files will work when RO adjudicators are considering an initial claim but also how it will be employed when a matter proceeds on appeal and the claimant adds additional information to the record. None of the challenges that will come with computerization of records is insurmountable. However, we should all recognize both that there will be challenges and that the computerization project will not solve the entire problem of delay by any means.

Second, I would be cautious about assertions that adding additional adjudicators to the various levels of the system will solve the problem of delay in and of itself. I do not have the intimate familiarity with the VA's inner workings to speak in detail about this matter. However, given what I have identified as some of the systemic causes of delay in the system (see Section II), I am quite skeptical that merely throwing more bodies in the system will sufficiently address the fundamental problem. To be sure, there should be sufficient staffing to address the caseloads at the various levels of the system. But even if fully staffed, I believe that delays will remain given the nature of many of the causes of delay in the system. See Section II, *supra*.

Having addressed these two caveats, the balance of this Section provides a discussion of some actions that could address the problems of delays in adjudication the Subcommittee is considering. I have broken that discussion into two parts. First, I discuss what I consider to be the most important thing Congress could do to affect systemic delays in adjudication: provide for a means of comprehensive revision of the current system from start to finish in which all relevant constituencies have a voice. This process is fraught with political difficulties and would be a major – perhaps even revolutionary – endeavor. Because I am not confident that such a comprehensive review is possible, the second part of this Section discusses more targeted actions that could be taken to reduce the delays in appellate adjudication.

Comprehensive System Review

As I discussed above, the current system by which veterans' benefits are awarded and those decisions reviewed developed in an ad hoc manner over many years. The result of that development is a system in which there are many levels of review some of which are non-adversarial and pro-claimant while others are more traditionally adversarial. The system functions, but it is clearly not the most efficient one. That inefficiency leads to delay.

As I have argued in other places, I believe that Congress should authorize the creation of a commission to consider what a more efficient system of awarding, and re-

³³ Allen, *Legislative Commission, supra* note 1, at 372–77.

viewing decisions concerning veterans' benefits should look like.³⁴ Such a Commission should be composed of representatives of all the relevant constituencies affected by and involved in the award of veterans' benefits. These constituencies include: veterans (and other claimants in the system), most likely represented through the various Veterans Service Organizations; the VA in all its facets (including most definitely RO adjudicators and the Board); the CAVC; the Federal Circuit; and Congress itself.

The Commission should be charged with evaluating the current state of appellate review of veterans' benefits determinations and making recommendations concerning what changes might be made to that system as well as in the administrative process more generally. The Commission should specifically be charged with considering how the structure of the system affects the time in which initial claims are resolved and appeals are finally adjudicated. There should be no constraints imposed on the Commission with respect to the options it might consider and/or propose. Finally, the Commission should be directed to submit a report to Congress within a defined period of time. That report should describe the Commission's activities, provide relevant background and statistical information, and set forth specific proposals for changes to the system warranted by the Commission's investigation.³⁵

While the Commission should not be limited in terms of the matters it considers, it should keep three interests in mind during its investigation and deliberations:

The Interests of Veterans

The paramount interest the Commission must consider is that of the veteran. The nation should never forget – and I am confident none of the people involved in the process do – that the entire structure of veterans' benefits law exists for the purpose of providing support to the men and women who served this country. Thus, the Commission must ensure that it proposes nothing that harms the interests of the beneficiaries of the system without expressly considering the aggregate benefits that could be argued to exist from a more streamlined system.

Veterans' interests fall into five broad categories:

- *Accuracy*: Veterans have an interest in ensuring that decisions concerning the award of benefits be as accurate as possible. The gains in accuracy that have likely been achieved over the past twenty-five years due in part to judicial review should be preserved.
- *Fairness*: It is critically important that the system of awarding benefits and reviewing such decisions both be fair and be perceived as being fair. Veterans need to believe that the system provides an opportunity for their claims to be adjudicated in a manner that is, broadly speaking, consistent with the rule of law. Thus, the gains in the nature of VA decision-making (e.g., better reasoned decisions) need to be preserved. In addition, the substantive fairness of the process needs to be preserved as well. Finally, one needs to be concerned with the speed of the decision-making process, recognizing that there is a trade-off between timely decisions and seeking to ensure that one reaches a "perfect" resolution of a given claim or appeal.
- *Transparency*: Closely related to fairness is veterans' interest in a transparent process. Largely as a result of the influence of the CAVC (although aided by Congress), the process of awarding benefits has become more open. That trend should be preserved.
- *Predictability*: It is important that the VA and veterans and their counsel be in a position to predict how issues will be resolved. Of course, there will always be a level of uncertainty in any legal system populated by humans. Nevertheless, the value of enhanced predictability of results is important systemically.
- *Finality*: No legal system can exist for long in any functional respect if disputes never come to an end. Veterans, as well as the VA, have an interest in having disputes resolved once and for all. The value of finality should not drive the system. There should be means of correcting errors, but those means need to be balanced against the interests of repose. Thus, finality itself is a value that should be considered when evaluating the current – or a future – system concerning the award of veterans' benefits and the judicial review of such decisions.

³⁴ See Allen, *Legislative Commission*, *supra* note 1. Some of the discussion in the text concerning the Commission I have proposed is based on written testimony I submitted in March 2010 to the full House Committee concerning its "Claims Summit."

³⁵ Congress should also ensure that the Commission has adequate resources with which to perform its functions. The Commission should be provided with a staff for, among other things, data collection and analysis as well as space in which to work. It should also have funds available sufficient to allow the Commissioners to travel so that public hearings can be held to obtain the greatest input of views as part of its work.

Institutional Concerns

A second interest that the Commission must consider concerns the preservation of American constitutional values. In particular, the importance in the American constitutional order of the maintenance of separate and independent centers of political authority must be a part of the Commission's deliberations. This is a structural concern. Thus, it is important to preserve an independent institutional check on the political branches' authority to award veterans' benefits.

The CAVC was created as an Article I tribunal, meaning that its members do not enjoy the tenure and salary protections afforded judges serving in the coordinate Article III judiciary. Under well-established law, there is no structural constitutional violation flowing from the assignment of the adjudication of disputes concerning veterans' benefits to such an Article I tribunal. Veterans benefits are a "public right." That is, entitlement to benefits flows from statutes instead of the common law or the Constitution itself.³⁶

The institutional concern the Commission must consider is less formalistic than a suggestion that one must necessarily have the Article III judiciary (beyond the Supreme Court) involved in the process to make it legitimate. Of course, that is one way in which one could preserve institutional concerns regarding separation of powers. But there are other ways in which such power divisions can be established and maintained. The key is that one needs to ensure that the system of review employed in the process contains sufficient independence that there is a meaningful check on the unilateral authority of the political branches.

The Public Interest

Finally, any consideration of the judicial review of veterans' benefits decisions needs to take into account the public's interest in maintaining a system that, while fair to veterans, also safeguards the great resources devoted to veterans and their dependants. The public has a right to ensure that the funds allotted to the VA for the payment of veterans' benefits are spent according to the directions of Congress.

As should be apparent from this discussion of a Commission, a systemic reconsideration of the current approach to the award and review of decisions concerning veterans' benefits would be a monumental endeavor. It would require buy-in from many actors and a willingness to approach these issues with open minds. I also believe, however, that such a comprehensive approach to the veterans' benefits system provides the best opportunity to either reduce delays in the system or come to a realization that, at some level, the delays in the system are present because there is some other value we collectively find so important that we are willing to countenance those delays. While I am not confident that such a systemic review of the system is likely to occur, I remain convinced that it is the best way to address the problems – real and/or perceived – in the current system

Some More Modest, Targeted Suggestions

Given the difficulties associated with a comprehensive review and/or overhaul of the current veterans' benefits system, this sub-section turns to more modest ways for potential reductions in the time to complete appellate adjudication of claims. In one way or another, these possibilities are tied to several of the causes of delay I identified in Section II above. It may be too strong a term to describe these possibilities as suggestions. They are better thought of as approaches to consider. I highlight several such items below in no particular order:

- As described above, Congress has been quite generous with veterans in terms of the benefits available. In addition, with respect to disability compensation, Congress has not placed any limitation on when such claims may be initiated. This lack of a time period within which to bring claims is certainly veteran friendly. However, if Congress were to enact a statute of limitations for most claims,³⁷ there would likely be a positive effect on systemic delays. This is so

³⁶See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (1982) (describing "payments to veterans" as an example of a public right (citation omitted)); Congress has wide latitude to assign the adjudication of disputes concerning such public rights to non-Article III adjudicators such as the CAVC. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

³⁷Such a statute of limitations would not have to cover all potential disability claims. Congress could legislate or authorize the VA to specify certain claims for which the current "no limit" system would continue. For example, such claims could include those based on diseases

both because there would be fewer claims in the aggregate and also because long-delayed claims are often more difficult to adjudicate given the passage of time between service and the claims process. Of course, this approach would restrict the claims available to veterans. It might be that Congress is not interested in doing so even if such an action would reduce delays, but it is something to consider.

- In a similar vein, Congress could assess whether all of the current claimant-friendly procedural protections in the system are worth the attendant cost in terms of delays in the process. No question, such an approach would be better if done as part of the larger systemic approach I have discussed above. And equally certain, such an approach would be controversial. But if one seeks to reduce delays, such actions would be useful in that endeavor.³⁸
- Congress could explore whether alterations in the structure of the Board would likely reduce delays on a systemic basis. One suggestion that has been mentioned in the past is the regionalization of the Board. Under such a system, the Board would not be a single entity based in Washington as it is currently. Instead, the Board would be divided into regions much as the federal circuit courts of appeal are in the judicial system more generally. There is a possibility that such regionalization of the Board would make the system more nimble in terms of dealing with RO decisions. I confess that I am not sure that such an action would reduce delay, but at a minimum this is a possibility that should be seriously considered as a part of efforts to streamline the appellate process at the administrative level.
- I also mentioned in Section II the oddity of having two layers of as-of-right appellate judicial review, that is having both the CAVC and the Federal Circuit as parts of the system. Congress could remove the Federal Circuit from the process essentially making the CAVC the sole means of judicial review of administrative actions subject only to discretionary review in the Supreme Court.³⁹ Such a system exists in the context of appeals from military courts with the United States Court of Appeals for the Armed Forces, also an Article I tribunal, the final judicial body in which one has a right of appeal with only discretionary review in the Supreme Court. Such a change in the system would be controversial. In my experience, many advocates for veterans are reluctant to remove the Federal Circuit from the process. I have not seen any empirical study to suggest that the Federal Circuit is, in fact, more friendly to veterans than is the CAVC. It seems that the resistance to removal of that court from the process is based more on anecdotal concerns. In the absence of some evidence to suggest that the Federal Circuit adds appreciably to quality of decision-making, I believe the time has come to seriously consider removing that body from the process.
- As I have mentioned at several points, and as the “hamster wheel” description of the current system suggests, the prevalence of remands in the system is a major cause of delay in the resolution of claims. Remands occur at both the administrative level (from the Board to the RO) as well as at the judicial level (from the CAVC to the Board). Actions could be taken at each of these steps in the system to address the remand issue and, consequently, delays in the adjudicatory process.

○ At the administrative level, Congress has already taken steps that should, over time, have a positive effect on the time in which appellate review is completed. For example, claimants now have the ability to waive initial consideration of new evidence introduced at the Board by the RO (thus preserving the statutory right to “one appeal to the Secretary”). Further steps are possible. One possibility would be to restrict by statute the discretion Board Members (or Veterans Law Judges) have to remand given matters. Such restrictions could be based on relatively simple criteria such as the time in which an appeal has been pending or the nature of the claim at issue. Alternatively, Congress could provide more detailed guidance in which it limited discretionary remands by more detailed matters such as the particular issue in contention. Congress could also be veteran-friendly when taking such steps by allowing a veteran to consent to a remand but not have one forced on him or her. I believe limiting the discretion to remand cases from the Board

or other conditions with long latency periods. The idea would be to limit claims based on more generic conditions.

³⁸To take just one example, Congress could shorten some of the time periods within which claimants may take certain actions, such as the one-year within which to submit a NOD concerning an RO action.

³⁹A hybrid possibility would be to have review in the Federal Circuit be discretionary even as to pure questions of law.

would have a positive effect on the time in which administrative appeals of claims are decided. However, such reductions in delay could come at the cost of having less reasoned consideration of certain matters. It could also have important effects on the nature of the Board. Such countervailing matters should be an important part of any decision to adopt these changes.

○ Remands are also a serious issue at the judicial level. One significant reason for such remands is the CAVC's reluctance to engage in statutorily prohibited fact finding. So, for example, the CAVC will conclude that the Board made a certain error (often because of the provision of insufficient reasons and bases). Having found such an error, the CAVC will almost always remand the case to the Board to adjudicate the appeal in the first instance.⁴⁰ No doubt, this course of action will often be correct so long as the CAVC is prohibited from making factual determinations in the first instance. However, I believe the CAVC (either on its own initiative or at the direction of Congress) could be more aggressive in using its power to reverse the Board as opposed to remanding a matter. Specifically, I have suggested elsewhere that the CAVC should adopt a form of hypothetical clearly erroneous review.⁴¹ Under this approach, the court would ask whether on the state of the evidence in the record if the Board had made a factual finding against the claimant, would the court have been left with the "definite and firm conviction that a mistake has been committed."⁴² The CAVC uses such a standard to assess actual findings of fact the Board has made.⁴³ It is true that the proposal would be for a hypothetical review of a finding of fact not actually made. My point, however, is that if the court were to conclude that on the face of the record existing before the court a finding of fact adverse to the veteran would be clearly erroneous, it seems that there is no need for a remand.⁴⁴ I have not attempted to assess empirically how much of an effect such hypothetical clearly erroneous review would have, but I suspect it could have a not insignificant impact over the run of appeals.

- Congress should also consider specifically authorizing the CAVC to consider adopting a rule for the aggregate resolution of issues on appeal. As I discussed in Section I, the CAVC has ruled in a number of decisions that it lacks the authority to resolve issues using a procedure akin to a class action in general civil litigation.⁴⁵ Whatever the merits of those decisions, I believe that adopting such a procedural approach could reduce delays in adjudication on a systemic basis. If the court were able to formally adjudicate an issue that had binding legal effect on hundreds or thousands of cases, I firmly believe that the process of adjudication would be streamlined. There is not time here to explore this concept fully. However, I strongly urge Congress to at least allow the CAVC to explore the adoption of such a rule.
- Finally, as I have mentioned above, a unique feature of the current system is that Congress has simultaneously indicated that it expects the administrative system to be non-adversarial while at the same time indicating that lawyers should be a greater part of the system. Unfortunately, the introduction of lawyers into the purportedly non-adversarial system has not been as smooth as one would have hoped. The reality is that no one has handled this development well. VA has not accepted their introduction. The CAVC has seemed uncomfortable with their presence. And the lawyers themselves have not seemed to embrace a role that is non-adversarial. I believe that if lawyers were used appropriately in the administrative system, the delays in adjudication would be reduced. For example, lawyers are trained to tie evidence to legal requirements. Thus, even in a non-adversarial system, lawyers should be able to assemble material that in the long run will make the claims adjudication process more efficient. Congress could accelerate the integration of lawyers into the system by mandating that the VA adopt regulations by which lawyers would be utilized to develop claims as part of the non-adversarial process. This will not be an easy task, but I firmly believe that it can bear significant fruit going forward.

⁴⁰ See, e.g., *Deloach v. Shinseki*, 704 F.3d 1370 (Fed. Cir. 2013) (affirming CAVC decision to remand instead of reverse); *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (same).

⁴¹ See Allen, *Commentary, supra* note 1, at 150–55.

⁴² See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (setting forth federal standard for clearly erroneous review of factual findings actually made).

⁴³ See, e.g., *Byron v. Shinseki*, 2011 U.S. App. Vet. Claims LEXIS 1293 at 11 (CAVC JUNE 20, 2011) (NON-PRECEDENTIAL SINGLE-JUDGE MEMORANDUM OPINION).

⁴⁴ I note here that engaging in such a hypothetical exercise is not unknown to the CAVC. It does something similar when it "takes due account of the rule of prejudicial error" in assessing whether an administrative error would have affected the ultimate outcome in the matter at hand. See 38 U.S.C. § 7261(b)(2).

⁴⁵ See FED. R. CIV. P. 23.

IV. Conclusion

In conclusion, I want to stress that nothing I have written should be taken to cast aspersions on anyone involved in the current system for the award and review of veterans' benefits. I firmly believe that the people who have elected to devote a good portion of their professional lives to working in this system have nothing but the best interests of veterans at heart. In many respects, they are heroes themselves because they are a contemporary example of President Abraham Lincoln's call in his famous Second Inaugural Address (as slightly edited to reflect today's society) for the nation "to care for him [and her] who shall have borne the battle and for his widow [or her widower], and his [or her] orphan."⁴⁶

But even with the best intentions – as I stress again I believe all those in this process have – there is no question that veterans and their dependants often wait a long time for the resolution of their claims for benefits. As I have tried to indicate, the causes of such delays are more complex than one might at first suspect. And they often can find their roots in aspects of the system that have some positive values.

All of this, in turn, means that potential solutions to the problem of delay are correspondingly complex. I have attempted to provide some suggestions for addressing the problem, but the reality is that none of the "solutions" are particularly easy. I have a great deal of respect for the Subcommittee's decision to focus attention on the problem. Thank you again for allowing me to submit this Statement as part of the process.

JAMES D. RIDGWAY

EXECUTIVE SUMMARY

The fundamental challenge for the veterans benefits system today, including the appellate process, is system effects. That is the term academics use to describe the problem that occurs in large systems when the number of rules grows so large that the system stops producing the desired result, even though each individual rule can be defended as making a positive contribution to the goal. We have long passed the point of critical mass where the sum total is too complex for adjudicators at every level to keep straight, much less for untrained veterans to understand. A better appellate system—and a better adjudication system in general—needs to move away from trying to deal with millions of veterans with millions of rules, and instead focus on finding the smallest number of rules that will fulfill the goal of creating a truly veteran-friendly system that is capable of delivering timely and accurate results.

An improved appellate process needs to contribute to this paradigm shift. In a system suffering from system effects, there are no magic bullets. The problem of complexity can be solved only by dramatic change. Because the large number of rules is the central challenge, a great number of individual parts must be critically examined and streamlined. These are just a few suggestions that I have proposed in the past, and are just the beginning of a larger project that must include all the stakeholders. Most importantly, changes must be rigorously tested with real veterans to make sure that they understand and benefit from the system that is supposed to be friendly and paternalistic toward them.

- First, the complex, inefficient rules for gathering evidence must be replaced with a mechanism that allows the most difficult cases to be resolved on appeal by live hearings with medical experts that fully explore the issues necessary to bring finality to claims.
- Second, the rules governing attorney fees in the appellate process need to be rewritten to align attorney incentives with the best interests of veterans. Instead of attorneys making money by adding ever more complexity to the system, they should profit from helping veterans obtain the evidence needed to reach a final decision.
- Third, instituting procedures applying global findings of fact to repetitive issues, instead of seeking medical opinions and military records in factually similar cases that should all result in the same outcome, would lead to faster, more uni-

⁴⁶See President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS 449 (Library of America ed., 1st Vintage Books 1992), also available at www.bartleby.com/124/pres32.html.

form results because the findings would be reviewed only once on appeal, rather than in each case.

- Fourth, all involved in the appellate process need to refocus (within their appropriate roles) on the first principle of making the system veteran-friendly. Notices, procedures, and other rules are helpful only if read, understood, remembered, and followed.

Everyone wants the system to provide better results, but at this point more rules increase delay, not quality. Less process and more effectiveness are the true answers.

Initially, my thanks to Chairman Runyan, Ranking Member Titus, and the Subcommittee for providing me with the opportunity to provide a statement for the record on this important issue. Although I began working for the Board of Veterans' Appeals last year, I have written a long series of articles analyzing the dynamics of the veterans benefits system, and the appellate process in particular. The Subcommittee has asked for my views as a private citizen and professorial lecturer in law at the George Washington University School of Law. Accordingly, this statement expresses my personal views, as developed in several previously published articles (see <http://ssrn.com/author=1378084>), and not official positions of the Department of Veterans Affairs.

Introduction

"Any intelligent fool can make things bigger [and] more complex. . . . It takes a touch of genius—and a lot of courage to move in the opposite direction." Attributed to Albert Einstein

Why are veterans seeking benefits waiting years on appeal? This is a very important question. The short answer is that the entire process suffers from system effects. That is the term academics use to describe the problem that occurs in large systems when the number of rules gets so large that the system stops producing the desired result even though each individual rule can be defended as making a positive contribution to the goal. In the veterans benefits system, the complexity has grown so great that the system produces veteran-unfriendly outcomes, even though each individual piece could be defended as advancing the goal of veteran-friendliness. Short of abolishing the entire system and restarting with a blank sheet of paper, there is no magic bullet for fixing the problem of too much complexity. Instead, each major component of the process needs to be reexamined and streamlined. Ultimately, solving system-effect problems is very difficult, and the only way to be sure that changes will work is rigorously test them to make sure that they produce faster, more accurate results that are understood by veterans as correct and fair.

I. Appellate Review by the Numbers

The first step to addressing the problems of the appeals process in the veterans benefits process is to define the concerns. The appellate process we have today stems from the Veterans Judicial Review Act of 1988 (VJRA). That Act created what is now the United States Court of Appeals for Veterans Claims (CAVC). The CAVC was established as an independent appellate court to review decisions made by the Board of Veterans' Appeals (BVA), the final decision maker within VA. The VJRA also provided an additional level of appellate review by the United States Court of Appeals for the Federal Circuit (Federal Circuit) between the CAVC and the United States Supreme Court. As a result, after a veteran receives an initial decision on a claim, he or she has the right to three levels of appellate review, one within the agency and two by federal courts.

Two decades of independent judicial review substantially changed the outcomes for veterans. When I compared FY2008 to FY1988 (the year the VJRA was passed), I found that the percentage of applications granted at least one benefit at the regional office level rose from 50% to 88%. *James D. Ridgway, The Veterans' Judicial Review Act Twenty Years Later: Assessing the New Complexities of the Veterans Benefits System*, 66 *N.Y.U. ANN. SURV. AM. L.* 251, 266–67 (2010). In addition, the average compensation (in 2008 dollars) for recipients of benefits rose from \$7,060/year to \$11,200/year. *Id.* There appears to be a strong correlation between independent appellate review and outcomes that are more favorable to veterans.

However, there is also a correlation between appellate review and processing times. From 1988 to 2008, the average appellate processing time within the agency doubled from 462 days to almost three years. *Id.* at 268. In FY2012, claims finally

decided by the BVA had waited 1040 days on average for a decision on appeal. Of course, if a disappointed veteran took advantage of the right to appeal to the federal courts, each additional step would add one to two years to the total processing time. Moreover, because most appeals raise only procedural issues, they are most likely to result in a remand to the agency for still further proceedings.

Therefore, the question is more complicated than simply the length of time involved. It is a matter of balancing the effect of appellate review on the system as a whole, with the costs it imposes in terms of money, time, and frustration. System effects are a real problem, but appellate review also produces tangible results.

II. Why is the System So Complex?

The complexity of the system that causes system effects is not an intentional feature. The system did not become complex overnight. Therefore, reducing complexity is not a simple matter of undoing a few changes to put the system back on the "right" path. Rather, complexity is the accumulation of nearly a century of decisions, each intended to steer a better course.

The veterans benefits system we have today is essentially the one designed for World War I. The system began as a mere fourteen pages of amendments in 1917 that effectively converted the Bureau of War Risk Insurance into the benefits agency for World War I veterans. See *James D. Ridgway, Recovering an Institutional Memory: The Origins of the Modern Veterans Benefits System, 1914 to 1958*, 5 *VETERANS L. REV.* 1, 17 (2013). In 1933, Franklin Roosevelt adopted this system when he created by executive order a universal system of benefits for veterans of all conflicts. *Id.* at 12. That same year, he also created the BVA to review decisions of the regional offices. *Id.* at 39.

Since the system was created, many, many new laws, regulations, and procedures have been added to address the emerging problems of each generation. To give just one example, 38 C.F.R. § 3.7 lists over fifty classes and subclasses of military service, including "[t]hree scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the United States Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945." 38 C.F.R. § 3.7(x)(32) (2012). It is a monument to our commitment to justice for our veterans that such care is taken to include rules that may pertain to only three veterans. However, the proliferation of rules creates an extraordinary challenge for adjudicators to recall, find, and correctly apply all the rules that may apply to each individual.

III. Complexity Itself Has its Own Costs

In spite of the best of intentions, the large number of veteran-friendly rules works against the goal of creating a veteran-friendly system. The idea of system effects is essentially a recognition that each new rule costs more than the last one, not just in administrative overhead, but in the mental energy required by claimants, adjudicators, and representatives to process and understand. This increased mental burden leads to longer decision times and more errors.

This result was not factored into the VJRA. The concept of system effects did not really exist when the current structure of appellate review of veterans benefits was created. Ten years after the VJRA, Robert Jervis published his seminal work on the subject, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* (1998). Only a decade ago, J.B. Ruhl and James Salzman published their breakthrough analysis of how system effects are a general problem for federal agencies, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 *GEORGETOWN L.J.* 757 (2003). They pointed out that, as the number of administrative rules increases in a system, compliance with those rules becomes harder and harder, and the payoff for each additional rule shrinks because the amount of time required to understand and follow the rules eventually outpaces the abilities of even very intelligent and very well-meaning individuals. The problem is not bad intent or even negligence. It is that human beings have fundamental limits in how much they can remember and synthesize, even with the assistance of modern technology.

In more concrete terms, rules are not free. Each rule takes a certain amount of effort to learn and recall. More importantly, as the number of rules increases, the number of interactions between those rules increases exponentially, $x=n(n-1)/2$. At a most basic level, 2 rules have 1 interaction between them, 3 rules have 3 interactions, 4 rules have 6 interactions, 5 rules have 10 interactions, 100 rules have 4,950 interactions, and 10,000 rules have nearly 50 million potential interactions to understand. In practice, not every rule has a meaningful interaction with every other rule, but adding a new rule to a system with a small number of rules is very different than adding a new rule to a system with thousands of pages of them. Even

if you identify and evaluate the costs and benefits of how that rule interacts with dozens or even hundreds of other relevant rules, it becomes practically certain that some interactions were overlooked and some unintended consequences were created. Therefore, a complex system will eventually exceed the ability of people to fully understand and follow, even with the best of intentions and efforts.

IV. Simpler

Only recently have we started to pay attention to both the need to reduce complexity and how to accomplish that goal. One of the best recent efforts to explore this area has been by Harvard Law School professor Cass Sunstein. As he explained, “Even when rules are complex, frustrating, and incomprehensible to the public, they tend to seem simple and straightforward to those who wrote them . . . Chess masters can immediately read a board, and in a fraction of a second, professional tennis players know how to handle a blistering crosscourt backhand. So too, rule writers understand the meaning of jargon-filled terms and requirements that seem impossibly baffling to those who are subject to them.” We need to “encourage the people who write rules to step back and reduce the strain on . . . people who are required to understand the rules.” *CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 215–16 (2013)*.

This is the fundamental challenge for the veterans benefits appeals system. Those involved in the appellate system must focus on making the system manageable not only for the appellate system, but for veterans, the veterans service officers who assist them, and the adjudicators who handle the claims. Unlike other systems, this appellate process reviews and shapes a system in which the claimants, adjudicators, and representatives on the front lines are not attorneys.

V. Toward a Simpler System

What is the challenge that system effects poses for the appellate system? One way to look at it is that the National Veterans Law Services Program publishes a *2,000-page collection of the statutes, regulations, and other rules of the veterans benefits system*, and another *2,000-page guide to the court case law interpreting those rules*. Even though each and every rule and case in this 4,000-page summary of veterans law may be defended as motivated by the best interests of veterans and a desire to make the system veteran friendly, we have long since passed the critical mass where the sum total is too complex for adjudicators and veterans representatives at every level to keep straight, much less for untrained veterans to understand. Moreover, it is too complex for those creating new rules to predict the total effect those rules will have on the system.

A better appellate system—and a better adjudication system in general—needs to move away from trying to deal with millions of veterans with millions of rules, and instead focus on finding the smallest number of rules that will fulfill the goal of creating a truly veteran-friendly system that is capable of delivering timely and accurate results. There are countless opportunities to reduce the complexity of the system. However, the steps we take must be based upon the bedrock principle that the system is intended to be veteran friendly both in outcomes and ease of use.

Here are a few options that I have explored. Certainly, this is only the beginning of a much larger project.

A. Better Evidence

As I have long maintained, the current process used to gather evidence in veterans benefits claims is inefficient and prone to error. So long as the evidence gathered in the process is of poor quality, it does not matter how the adjudication and appellate processes work. No one will have much faith in the results. Obtaining high-quality evidence would not only produce better satisfaction with the results, but would reduce the burden on the appellate system to decide what is just when the facts are less clear than they could be.

In 2008, I made two key suggestions for improving this process in an article for the Paralyzed Veterans of America’s annual writing competition, which was published the following year: *James D. Ridgway, Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence, 18 FED. CIR. B.J. 405 (2009)*. The first suggestion was for VA to create “opinion forms that—if properly completed by a physician—will answer all the questions necessary to adjudicate the claim.” *Id.* at 423. VA’s current Disability Benefits Questionnaire initiative is beginning to implement this advice. The challenges it faces, however, are emblematic of how the underlying complexity of the system makes streamlining any given part more difficult. As the DBQ process comes on line, appellate review must not confuse complexity with improvement, nor overburden the forms with so many requirements that neither veterans nor their private physicians can understand and complete the

forms in a reasonable amount of time. Evidence that is never generated and submitted does nothing to help veterans.

My second suggestion was focused on the appellate process itself, and has yet to be explored. As I stated, even with good opinion forms, “there would still be many difficult cases in which the B[VA] or the CAVC decides upon review that the opinions in the record are inadequate. At such a point, the issues are likely to be complicated, and the veteran’s interest in a speedy resolution merits a more robust procedure than simply another written request for an opinion.” *Id.* at 426. In such cases, the BVA should have the option to conduct a non-adversarial video hearing with a medical expert to fully explore the claim and bring resolution to the difficult issues. *Id.*

These recommendations were based in part upon my experience as a trial prosecutor, which taught me firsthand that some issues are simply too difficult to understand through the slow and laborious process of written requests and opinions. Only a direct discussion allows for complete understanding. More importantly, such interactions teach lawyers and doctors how to better communicate with each other, even in those cases in which a hearing is not held.

Of course, such hearings would require the consent of the veteran and the participation of his or her representative. However, section 501 of last year’s “The Honoring America’s Veterans and Caring for Camp Lejeune Families Act” demonstrates that there is support for allowing the BVA to consider new evidence in the first instance when it is the most efficient way to resolve a claim quickly and accurately.

B. Realigning Attorney Fee Incentives

A second suggestion that I have made is to restructure the attorney fee provisions in the appeals process. See James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 *AM. L. REV.* 1037 (2013). The fundamental problem is that the current system creates strong financial incentives for attorneys representing veterans to advocate for an increasing number of procedural rules generated by the federal courts, instead of helping veterans obtain the evidence needed to bring their claims to resolution. This creates a game of “procedure whack-a-mole” where VA is constantly trying to respond to new procedural requirements, while the courts are generating ever more rules even before their previous rulings have been absorbed. The problem is compounded because attorneys frequently do not continue representation when a claim is remanded and do not help veterans get the evidence needed to resolve the claim.

The procedure whack-a-mole game occurs because attorneys have historically become involved in claims at the CAVC level after the record is closed and no further evidence may be submitted. There is almost never sufficient evidence to win a reversal from the CAVC because the multiple reviews within VA lead to the granting of claims supported by adequate evidence. Therefore, the CAVC -- like other federal appellate courts -- rarely concludes that there was clear error in the fact finding below. Attorneys are forced to argue that there was a procedural error that requires a remand to the BVA, where the record will be open again. Accordingly, in most cases addressing novel issues, the CAVC has a choice only of either affirming the status quo or adding a new rule that makes the system more complex. Adding simplicity is never an option.

The problem is compounded by the CAVC’s decision in *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (en banc), which held that “a fee which includes both an [Equal Access to Justice Act (EAJA)] award plus a contingency fee for work performed before the Court, Board, and VA on the same claim such that the fee is enhanced by an EAJA award is unreasonable.” In other words, in an attorney is paid an EAJA fee for work at the CAVC level, that payment must be offset from any future contingency fee. The court meant to be veteran friendly with this ruling and leave more money from awards in the pockets of veterans. However, as I outlined in the article listed above, in practice it makes it financially impossible in many cases for attorneys to continue representation on remand and actually help veterans in complex cases obtain the evidence needed to bring their claims to final resolution. See Ridgway, *Fresh Eyes*, at 1048–50.

The financial incentives of attorneys need to be realigned with those of the veterans they represent. To be clear, the problem is the rules governing the attorneys and not the attorneys themselves. As president of the Court of Appeals for Veterans Claims Bar Association and in other roles, I have come to know many of those who represent veterans for a living. Many are veterans themselves. All whom I have met sincerely wish to not only help their clients, but also to make the system the best that it can be for all veterans. However, there is a limit to the amount of pro bono work that they can do, and most of their time has to be spent performing fee-generating work that pays their bills and feeds their families.

A better fee system would allow attorneys to make reasonable livings generating evidence to resolve cases instead of generating procedure to prolong them. Rather than awarding fees under EAJA, the veterans benefits system needs a fee structure that aligns the financial interests of attorneys with the best interests of their clients: faster decisions based upon reliable evidence. Designing such a system will be a challenge. In my article, I outlined some potential features. However, one essential feature is a rule that replaces Carpenter with a rule that if an attorney continues representation before VA after a remand from the federal courts and helps obtain the evidence necessary to grant the claim, then that is necessarily different work and must be compensated as such, or attorneys will not be able to afford to provide that assistance.

C. Mass Fact Finding

Of course, complexity is also driven by the massive number of claims. Unfortunately, these rules do not resolve disability claims efficiently. Even though compensation benefits for medical disabilities are far from the only benefits provided to veterans, they are 95% percent of the claims appealed to the BVA and (based upon my ten years of experience with the CAVC) an even higher percentage of the claims appealed to the courts. The appeals system deals with medical disability claims because these are the claims that are the hardest. Our knowledge of medicine is constantly evolving and reveals ever more complexity about how our brains and bodies work. The appeals system cannot succeed by addressing medical complexity with legal complexity. Rather, it must respond with legal simplicity. In the future, the system needs to rely on simple procedures that allow for a fast, flexible response to emerging legal and medical issues. Medical and legal experts need to come together to fully explore issues.

In *Heckler v. Campbell*, 461 U.S. 458 (1983), the Supreme Court accepted the idea that agencies could resolve common factual issues through global findings of fact that provide a uniform answer to all claims that raise the same issue. Such findings can be published in the Federal Register and updated as appropriate. Although VA can and does resolve some cases with regulatory presumptions, less cumbersome options need to be fostered. There are many cases that cannot be resolved with presumptions, but could have the number of issues that need to be proven reduced if global findings of fact were applied, such as which military occupational specialties are associated with exposure to noise levels that contribute to hearing loss. Much effort could be saved if we applied global findings of fact to repetitive issues, instead of seeking medical opinions and military records in factually similar cases that should all result in the same outcome. Such procedures would lead to faster, more uniform results because the findings would be reviewed only once on appeal, rather than in each case that has the same issue. VA has begun to utilize this concept with lists of Navy ships with brown-water service in Vietnam and of units that served in the Korean DMZ when Agent Orange was used, but it has much more potential.

VII. Reducing Complexity

Improving the quality of evidence will reduce pressure to add more rules in the central arena of the benefits system. Eliminating skewed attorney-incentives will curb the biggest driver of additional complexity. Mass fact finding will reduce the number of times an issues must be reviewed. However, we need to do more than just halt the increase in complexity. We need to reverse it.

As I have explained in more detail in my articles cited above, both the evidence-gathering and the procedure-whack-a-mole problems were unintended consequences of the VJRA. The VJRA had the desired effect of improving outcomes for veterans, making VA more accountable, and ensuring that the agency follows its procedures. However, it also had the unintended consequence of creating a proliferation of new rules that have dramatically lengthened the time it takes to decide difficult cases. On balance, the VJRA has been a smashing success, but a quarter century later, the time has come to face the new realities of the system and ask what approaches are now best for handling the biggest challenge that the system faces today: too much complexity.

Reversing the growth in complexity has many features, but fundamentally it is about: (1) focusing on the core functions that the benefits system and appellate process need to perform, (2) designing simpler approaches to these functions, and (3) testing those new approaches to ensure that adjudicators, veterans, and their representatives actually understand the rules and believe that the outcomes produced are fair. Perhaps not every piece of the system needs to be changed, but every piece needs to be examined. We must ask questions like: "What notice will actually communicate information to veterans instead of being discarded as too long and baffling?"

The identification and examination of the pieces needs to involve all stakeholders. As a proud member of the Sons of the American Legion, I know that no reform will be possible without the enthusiastic support of the major veterans service organizations that represent the interests of the tens of millions of veterans our system serves. However, the table must include representatives from the courts and veterans attorneys as well. Most importantly, it should include independent experts on system effects and complexity who can provide a neutral voice, constantly steering the dialogue towards defining the system with as few, simple rules as possible. Therefore, the challenge for Congress is to determine how best it can foster this conversation and to facilitate the changes that will make the system simpler, faster, and more friendly to veterans in the process.

Thank you for considering my views. I look forward to assisting in the improvement of the system in any way that I can.

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES

The National Organization of Veterans' Advocates, Inc. (NOVA) thanks Committee Chairman Runyan and Ranking Member Titus for the opportunity to offer our perspective on the breakdown in the VA's current appeals process. NOVA is honored to share our views and offer solutions for this hearing.

NOVA is a not for profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 500 attorneys and agents assisting tens of thousands of our nation's military Veterans, their widows, and their families obtain benefits from VA. NOVA members represent Veterans before all levels of the VA's disability claim process. This includes the Veterans Benefits Administration (VBA), the Board of Veterans' Appeals (BVA or Board), the U.S. Court of Appeals for Veterans Claims (Veterans Court or CAVC), and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of Veterans when the CAVC awarded the Hart T. Mankin Distinguished Service Award.

NOVA's Previous Suggestions for Improvement

On February 11, 2009, NOVA testified before the Senate Committee on Veterans' Affairs regarding the problems in the VA's claim adjudication process. Later that same year, on May 14, 2009, NOVA testified before the Subcommittee on Disability Assistance & Memorial Affairs of the House Committee on Veterans' Affairs on the topic of "Examining Appellate Processes and their Impact on Veterans." For the sake of brevity, we incorporate NOVA's previous testimonies herein by reference and crave the Committee's attention to such. In NOVA's previous testimonies, NOVA provided its perspective on the appeals process as it exists within the regional offices, BVA, and CAVC. NOVA also suggested improvements to the process. This testimony will focus and elaborate on one of those suggestions—amending 38 U.S.C. § 7105 to provide that the veteran must file only one document to appeal from a regional office decision to the BVA.

Roadmap of the VA's Current Appellate Process

After a veteran files an application for benefits—referred to as a "claim"—the servicing VA regional office issues the initial decision. If the veteran disagrees with any part of the decision, the veteran may file an appeal with the regional office, and, if the regional office does not grant the veteran's appeal, the veteran may continue his appeal to the BVA. For a dissatisfied veteran to get an appeal from the regional office to the BVA, 38 U.S.C. § 7105 currently requires the veteran to file two different appeals at two different stages in the process.

To appeal an initial rating decision, the veteran must file a notice of disagreement (NOD) within one year from the date the decision was issued. In response to this first appeal—the NOD, the regional office will issue one of two decisions. If granting the veteran's appeal, the regional office will issue another rating decision. If denying the veteran's appeal, the regional office will issue a Statement of the Case (SOC). Although the SOC will contain a verbatim copy of any applicable statutes and regulations, many times the SOC's reasons or bases for the VA's continued denial of benefits is simply a reiteration of the appealed rating decision. Our experience has been that SOC's are not helpful to the vast majority of veterans. However, if after receiving an SOC the veteran wants to continue his appeal to the BVA, the veteran must file a VA Form 9, *Appeal to Board of Veterans' Appeals*, within 60 days from the date the SOC was issued or within one year from the date the initial rating decision was issued. On the VA Form 9, the veteran is encouraged to explain why he or she disagrees with the VA's statement of reasons or bases in the SOC. If the veteran

does not file both the NOD and VA Form 9, there will be no perfected appeal to the BVA.

After a veteran files a VA Form 9, the regional office must certify the appeal to the BVA and transfer the case, as well as jurisdiction of such, to the BVA for further adjudication. Although the veteran must file the NOD and VA Form 9 within certain statutes of limitations as mentioned above, there are no statutes or regulations mandating how quickly the regional office or BVA must respond to or certify a veteran's appeal.

Breakdown in the Appellate Process

When NOVA testified in 2009, the BVA had reported in its 2008 Annual Report that it took VA an average of 218 days to issue an SOC in response to a veteran's NOD.¹ The Board further reported that, because of the continuous filing of over 4,000 new appeals, it took an average of 446 days from the initial filing of an appeal to the ultimate disposition of the appeal.²

In fiscal year 2012, VA received 121,786 NODs. However, the number of SOCs that were processed by the VBA was only 76,685. As a result, the number of NODs awaiting disposition increased by 76 percent from fiscal years 2009 to 2012 and, during that period, the time it took VA to process an SOC increased by 57 percent from 293 days to 460 days on average.³ A 2012 VA Office of Inspector General report noted that VA regional office managers did not assign enough staff to process appeals, diverted staff from processing appeals, and did not ensure that their appeal-staffs acted on appeals promptly because, in part, those staff members were assigned responsibilities to process initial claims, which were given a higher priority.⁴ As of August 2012, after the veteran filed his or her second appeal—VA Form 9—it took an average of 560 days for VA regional offices to certify and transfer the appeal to the BVA.⁵ The 2012 Annual Report of the Chairman of the Board of Veterans' Appeals indicated that average elapsed processing time after an appeal was certified and transferred to the Board was 251 days.⁶

Based on the BVA Chairman's 2012 report, the average elapsed processing times are as follows:

460 days for a veteran to receive an SOC after filing a NOD.

40 days for a veteran to file a VA Form 9 after receiving an SOC.

692 days for the regional office, after receiving a veteran's VA Form 9, to certify and transfer the appeal to the BVA.

251 days for the BVA to make a decision after receiving the veteran's appeal from the regional office.

Thus, from the time the veteran files the first appeal—the NOD—he or she waits on average a total of 1,443 days to receive a decision from the BVA on that appeal. That is 17 days shy of four years a veteran must wait for resolution of an appeal!

NOVA's Suggested Repair to the Process

In May 2009, NOVA testified and recommended that Congress amend 38 U.S.C. § 7105 to provide that the veteran must file only one request for appeal. This statute has been in effect since 1958. See P. L. 85-857, § 1, 72 Stat. 1241, Sept. 2, 1958. The U.S. Court of Appeals for Veterans Claims was created in 1989. Thus, prior to the Court's creation, VA operated without judicial review. The advent of judicial review has eliminated the need for redundant appeals at the VA's administrative level. Therefore, the VA's appeal statute should be amended to require only the filing of a NOD and nothing more. Such an amendment would eliminate the VA's requirement to issue an SOC and the veteran's need to file VA Form 9 to reiterate and reaffirm his/her appellate desires.

As the above-referenced statistics confirm, significant delays continue in the time taken by VA to process an SOC and certify an appeal to the BVA. NOVA's proposal

¹ Department of Veterans Affairs FY 2008 Performance and Accountability Report, p.119 located at INK "<http://www.va.gov/budget/report/2008/index.htm>" <http://www.va.gov/budget/report/2008/index.htm> and Report of the Chairman, Board of Veterans' Appeals, Fiscal Year 2008, p.19, average elapsed time from the date of the notice of disagreement's receipt until the VA's issuance of the statement of the case.

² Chief Judge William P. Greene Testimony to Senate Committee on Veterans' Affairs, pp.1–2 (11/7/07).

³ United States Government Accountability Office (GAO) 13-453T, Veteran's Disability Benefits: Challenges to Timely Processing Persist (March 13, 2013) pp. 7–8.

⁴ VA Office of Inspector General, Veterans Benefits Administration: Audit of VA Regional Office's Appeals Management Processes, (Washington D.C.: May 30, 2012).

⁵ GAO 13-89 VA Disability Benefits Processing Remains a Daunting Challenge (Dec. 21, 2012), p. 8.

⁶ <http://www.bva.va.gov/docs/Chairmans—Annual—Rpts/BVA2012AR.pdf>, p. 19.

to amend the provisions of § 7105 to remove the requirements for the issuance of an SOC and the subsequent filing of a second notice of an intent to appeal (VA Form 9) would eliminate these time delays in the appeal process. It will obviously save time following the submission of a NOD to transfer this first appeal directly to the BVA without further pleadings, unless the veteran requests review by a Decision Review Officer (DRO) at the VA's regional office.

In 2001, VA established the DRO process as an alternative appellate review at the regional office level. Currently, a veteran must actively elect the DRO process if he or she desires such review; otherwise, the veteran's appeal is processed by the traditional appeals process, which means a staff member of the regional office's appeals team—and not a DRO—reviews the veteran's appeal. DRO adjudicators are the VA's most experienced adjudicators and have the same *de novo* review authority as do the 60 Veterans Law Judges of the BVA. If a veteran chooses the DRO review process, a DRO conducts a *de novo* review of the claim, meaning a new and complete review of the claim and evidence without deference to the original decision. A DRO may make a new decision based upon his or her review of new evidence or by finding a clear and unmistakable error in the previous decision. Also, the DRO may make a new decision simply due to a difference of opinion and without receiving new evidence or finding a clear and unmistakable error in the previous decision. See GAO, Veterans Disability Benefits: Clearer Information for Veterans and Additional Performance Measures Could Improve Appeal Process, GAO 11-812 (Washington, D.C. September 29, 2011). Currently, if the veteran elects the DRO process, the DRO is the decision maker who will issue another rating decision or SOC.

If § 7105 is amended to eliminate the requirements for the issuance of an SOC and the filing of a VA Form 9, the appeals team at a VA regional office will be able to redirect staff and resources to tackling the backlog of appeals as opposed to processing additional and redundant appeal paperwork. For example, VA could better use its DROs within the appeals process and avoid unnecessary appeals to the BVA. By eliminating the SOC and VA Form 9 requirements, the DROs would have more time to review all NODs filed by veterans and either resolve the appeals favorably or certify the appeals directly to the BVA without taking additional time to issue an SOC and wait for the veterans to file a VA Form 9. Also, Congress' expectation is that VA will "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." See H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95. However, at present, the single most prevalent reason for remands from the Board and the Court is for further development of the claim by VA. DROs have the authority to reduce the need for such remands by ordering the development of a claim that was not fully and sympathetically developed to its optimum before it was decided on the merits.

By amending § 7105 as suggested, VA could also redirect staff and resources to processing appeals that are remanded by the Board or the Court. Veterans whose cases have been remanded have been waiting the longest for resolution of their appeals. Per 38 U.S.C. § 7112, the Secretary must "provide for the expeditious treatment by the BVA of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims." At the BVA, an office or team is designated to processing appeals remanded from the Court to the BVA, and this process does seem to streamline Court remands and result in quicker BVA decisions on such appeals. However, many times, appeals remanded by the Court to the BVA are, in turn, remanded by the BVA to a regional office. Also, 46 percent of claims appealed to the BVA are remanded to a regional office. Per section 5109B, the Secretary must also "provide for the expeditious treatment by the appropriate regional office . . . of any claim that is remanded to a regional office . . . by the BVA." It appears, however, that cases remanded to a regional office do not receive priority ahead of other appeals being processed by a regional office. Thus, these appeals do not receive expeditious treatment as dictated by law.

Conclusion

NOVA proposes amending 38 U.S.C. § 7105 to provide that the veteran must file only one document for appeal, the NOD, in order to reduce the delays extant in the VA appeal process. Redundant appeals at the VA's administrative level do not serve the interests of our veterans and their families. An expedited appeal process is needed to reduce unnecessary delays. The current delays can be eliminated by streamlining the VA's appeal process. It is unacceptable that veterans die while waiting for their appeal to be resolved. The statistics document the delays inherent in the existing statutory scheme. That scheme must be amended in order to permit VA to meet this country's commitment to those who have born the burden.

NOVA respectfully requests that the Committee consider our proposal to amend the provisions of § 7105 to remove the requirements for the issuance of an SOC and

the subsequent filing of a second notice of an intent to appeal (VA Form 9). NOVA submitted this proposal in 2009 and here we are again in 2013. Four years have gone by and the fact remains the same: one request for appeal is enough. Clearly, now is the time to redirect staff and resources to eliminating the backlog of appeals, before precious time runs out for our veterans. At this point, it is a matter of both urgency and necessity.

As always, NOVA stands ready to assist the Committee or VA in whatever way possible to further eliminate the unreasonable systemic delays that negatively affect the lives of our nation's veterans and their families.

We thank you for this opportunity to provide our testimony.

MATTHEW MIDDLEMAS

Chairman Runyan, Ranking Member Titus, and Subcommittee Members. I am honored and privileged to have this opportunity to offer my personal views to you regarding the appeals process. This is my own personal view and I am not acting as an official of the United States Department of Veterans Affairs and I am not expressing any views of the United States Department of Veterans Affairs and again, this is my personal statement as a citizen of the United States. This statement was also prepared on my own time and not while on duty.

I have been a Decision Review Officer (DRO) at the Milwaukee VA Regional Office (VARO) since October 2002. I have worked at the VARO since November 1997. The following are my thoughts and concerns about the appeals process within the Veterans' Disability Claims process. Please consider my use of the word "him" to mean both male and female veterans.

The appeals process begins with the claims process itself. Once we make a decision on a claim - that is "rate" the claim - and inform the Veteran of the decision, the Veteran has one year from the date of our decision notification letter to file a Notice of Disagreement (NOD).

Currently there is no required form for the Veteran to submit in order to file an NOD. There is no required language a Veteran must use to file an NOD. The veteran must simply express, in writing, disagreement with a decision.

In May 2013, VA released a new form, VA Form 21-0958, Notice of Disagreement, which is now being attached to Veterans' decision notification letters. However, there remains no requirement for this form to be used in order to file an appeal.

Currently, the veteran has the choice of 2 different options to review his initial NOD: 1) DRO review, or 2) Traditional review.

A DRO review is a de novo review of the veteran's entire claims file, which is conducted by a DRO. The DRO has a higher level of decision-making authority than that of a Rating Specialist, to including single signature authority to call clear and unmistakable errors (CUE), and the authority to change a prior decision in the veteran's favor based on review of the same evidence that was present in the prior decision (difference of opinion).

A Traditional review can be performed by a Rating Specialist or a DRO, and it is not a de novo review. The review authority is the same as a Rating Specialist.

If a veteran files an NOD without indicating a DRO election, we must write to the veteran, inform him of his options, and give him 60 days to respond. We cannot work the appeal until we either receive a response or the 60 day response period has expired. If no response is received, the appeal defaults to the Traditional process.

Appeals are controlled by the date of receipt of the NOD in a system called VACOLS (Veterans Appeals Control and Locator System). A single NOD may express disagreement the decisions rendered in a single Rating Decision, or it may express disagreement with decisions rendered in multiple Rating Decisions which have been issued in the prior year. There is no limit to the number of decisions or ratings with which the Veteran may disagree. There is also no limit to the number of NODs a veteran may have pending at any given time. A Veteran may also continue to file new claims while his appeal(s) pend.

If a Veteran requests a Regional Office hearing, this must be conducted and we must receive the transcript before a decision can be rendered. If the Veteran submits or identifies additional evidence, we must develop for and try to obtain the evidence prior to rendering a decision. If VA examinations are deemed necessary, we schedule these and wait for the examination reports before rendering a decision.

Once the appeal issues are ready for decision (RFD), ideally, NODs should be worked from the oldest pending to the newest received, with the exception of priorities, which include Homeless Veterans, Seriously Injured/Wounded Veterans, Con-

gressional Inquiries, and Financial Hardship cases, etc. Priorities are worked before all other pending claims.

This also means that a Veteran who has filed multiple NODs over time, may only receive a decision concerning his oldest pending NOD, while the issues contained in his other "younger" NODs remain pending.

The file is reviewed and decisions are rendered. If all of the issues within an NOD can be granted in full, a rating is prepared to grant the issues. Otherwise, we must issue a Statement of the Case (SOC) to the Veteran, which provides the applicable VA regulations and explains the reasons for the decision(s).

Once an SOC is issued, the DRO process is complete. If the appeal continues, it is now under the Traditional appeals process. DRO authority does not extend beyond the issuance of the SOC.

In order for a Veteran to continue the appeal, the VA must receive a Substantive (Formal) appeal, which is a VA Form 9, Appeal to Board of Veterans' Appeals, or an equivalent statement of intent to continue the appeal. There is no legal requirement that a specific VA Form must be received in order to continue an appeal, but VA must receive some form of communication in writing from the Veteran or his Representative indicating an intent to continue the appeal.

A Veteran has EITHER the remainder of one year from the initial decision notification letter, OR 60 days from the date the SOC was mailed, to file his Substantive appeal. Otherwise, his appeal rights for those issues expire, and the NOD is closed.

If the Veteran has filed a timely Substantive appeal, the next step in the appeals process is to certify the appeal to the Board of Veterans' Appeals (BVA), which is to transfer jurisdiction of the appeal to BVA.

However, the Regional Office cannot physically send the claims file to BVA until all pending NODs and all pending claims have been decided. There can be no appeal issues pending before the Regional Office at the time the claims file is sent to BVA; otherwise, BVA will issue a Remand instructing the Regional Office to issue an SOC on any pending appeals.

Additionally, if the veteran has requested a BVA travel board hearing or BVA Video conference hearing, the claims file remains physically at the Regional Office until the BVA hearing can be scheduled.

In the past, if any additional evidence was submitted which related to the issues under appeal, then the Regional Office had to review the additional evidence, and if the appeal continued, it had to issue a Supplemental Statement of the Case (SSOC) explaining why the additional evidence did not change the prior decision and give the Veteran 30 days to reply. If yet more evidence was received, another SSOC was issued with another 30 day reply period. There was no limit to the number of SSOCs which could be issued. The appeal could not be certified to BVA until all of evidence in the claims file had been considered at the Regional Office level.

If an appeal was certified to BVA and additional evidence was subsequently received, the Regional Office had to either obtain a waiver of jurisdiction from the Veteran or his Representative, or the appeal had to be removed from certified status and another SSOC issued. Following the 30 day reply period, if no additional evidence was added to the claims file, the appeal could be re-certified to BVA.

This is the stage where many delays occurred because many Veterans have multiple appeals pending in various stages of the appeals process. Additionally, they will also have new claims pending in various stages of initial development. Therefore, every time additional evidence was added to the claims file, the Regional Office Appeals Team had to review all of the appeals to determine if an SSOC was necessary. If so, then any appeals already certified to BVA had to be removed from certified status, and the process continued to repeat itself until such time that all evidence in the claims file had been considered in a decision at the Regional Office level. It was only then that we could physically transfer the file to BVA jurisdiction.

Effective February 2, 2013, Section 501 (Automatic waiver of agency of original jurisdiction review of new evidence) of Public Law 112-154 took effect. This change in law established an automatic waiver of Regional Office (agency of original jurisdiction) review of evidence received after receipt of the substantive appeal. The evidence is subject to initial review by BVA unless the appellant specifically requests, in writing, initial review by the Regional Office.

However, to date, we have received no guidance from Compensation Service and Pension and Fiduciary Service on how to implement this provision.

Therefore, at least at the Milwaukee Regional Office, we are still issuing SSOCs until we receive guidance to do otherwise. I would also note that I personally have seen two separate BVA Remands dated from April 2013, which is after the change in law, in which a BVA judge noted there was evidence in the claims file received after the substantive appeal which the Regional Office had not considered. Both Re-

mands ordered the Regional Office to consider this evidence as part of the reasons for the Remand.

Hopefully, however, Section 501 of Public Law 112-154 will help us certify and transfer appeals to BVA in a much more timely manner. It will also, hopefully, reduce the number of Remands caused by the submission of additional evidence without a waiver of review by the agency of original jurisdiction.

As you can see, the appeal process is complex and concerns remain.

As there is no requirement to use a standardized form to file an NOD or a Substantive appeal, it is easy to miss an appeal as it may be hidden on page 22 of a veteran's handwritten statement.

Furthermore, it is not always clear if the Veteran is actually filing an appeal or not. For example, use of the word "reconsider" may or may not mean disagreement. We try to clarify intent with the Veteran or Representative, but even then, the Regional Office may consider the veteran's statement to be a new claim and issue another Rating Decision, but then BVA considers the same statement to be a missed NOD and Remands the issue for the Regional Office to send an SOC.

VA's primary focus over the past several years has, understandably, been to find ways to break the backlog of claims.

This has resulted in Journeyman RVSRs feeling constantly pressured to produce more and more decisions at a faster and faster rate, while, at the same time, having their jobs threatened if their accuracy drops in the process. There are, unfortunately, experienced Journeyman RVSRs who have either quit or retired because they could not tolerate the pressure any longer.

This has resulted in trainee RVSRs (Rating Specialists) being released to single-signature rating before they are truly competent or comfortable in their duties.

The focus on breaking the backlog of claims resulted in the hiring of numerous RVSR trainees over the past several years. These individuals needed mentoring as well as someone to review the accuracy of their work until management felt they were sufficiently competent to rate single-signature. In my office, the majority of new hires and internally promoted employees needed second signature review of their work for at least one year before they reached an accuracy level sufficient for single signature. With the large number of trainees in our office, we did not have a sufficient number of Journeyman RVSRs to complete the reviews. Additionally, the RVSRs were being mandated to rate claims above all else. Therefore, the DROs were assigned co-signing and mentoring duties, which took up significant amounts of our time, which were then not spent working appeals.

RVSRs are being trained to use "tools" to help them generate their decisions, so there is nation wide consistency in decision making. However, unfortunately, it appears the RVSRs are not being fully trained on how to actually analyze all of the evidence in a claims file, so they are not always entering the most accurate and reflective evidence of a Veteran's disability picture. Many RVSRs are now simply entering the data found in a VA DBQ Examination report into a tool, rather than looking at and weighing all of the evidence in the claims file. As a result, we are getting appeals from Veterans and their Representatives noting the other evidence of record which did not appear to be considered.

Likewise, current rating procedures only require an RVSR to provide the reasons for the decision. There is little to no discussion in the Rating Decision of how evidence was weighed and evaluated. As a result, we are getting appeals from Veterans and their Representatives because they simply do not understand how we arrived at our decision.

Understandably, DROs are some of the most experienced and knowledgeable employees concerning the claims process at most Regional Offices. However, as a result, we are regularly pulled from our appeal work duties and assigned other projects. During the recent Nehmer review, I was one of three DROs in our office who worked Nehmer claims exclusively for almost six months. We did not work any appeals during the Nehmer review. I personally spoke to DROs from other offices who also reported they were not working any appeals during the review.

Most recently, the Milwaukee appeals team was informed our office would be brokering-in over 5,000 claims in various stages of development, all of which are over one year old. The appeals team was informed we would be rating claims full-time through the end of the fiscal year, and other than priority cases, we would not be working any appeals during this time frame.

It is fully understandable that management needs the assistance of DROs to accomplish their goals; however, it is at the expense of the appeal workload, and as a result, appeals keep getting older.

In many Regional Offices, RVSRs work the Traditional appeals, and the DROs work the DRO elections. Working traditional appeals is actually part of the job standard for RVSRs. However, with the concern for the backlog of claims, the re-

sponsibility for working Traditional appeals is falling mainly on the DROs. RVSRs are focusing on rating claims, not Traditional appeals. There are far fewer DROs than there are RVSRs. DROs simply cannot handle the volume of pending appeals on their own. If we are going to make a dent in the appeal backlog, then we are going to need the assistance of the RVSRs.

Finally, VBMS is a concern for appeals. First, while it has been rolled out nation wide, it is not fully functional and has more “work arounds” than can be described here. The program regularly crashes for at least some portion of the day, so you cannot even use it. Decision makers regularly lose work they have been working on for hours. Either the program times them out and they lose their work, or they get an error message and everything just disappears. The entire program seems designed for initial claims processing, which does not require a detailed explanation of the reasons for the decision. However, for appeals, we still have to explain everything. The program has no glossary or autotext, which makes typing a decision even longer. It has no spell check, so the quality of our writing is poor in many cases. It does not allow you to copy and paste from another document, which just requires more time to type out the decision, thus getting less work accomplished during the day. Without any doubt, it has consistently taken me far longer to process an appeal using VBMS and VBMS-R than it ever took with a paper file and RBA 2000.

Finally, there really has been no guidance, to date, on how appeals will be worked into VBMS. Currently, appeals are controlled through VACOLS without end products. Therefore, any NODs which are received must be sent to the appeals team so a VACOLS record can be established. Unfortunately, some NODs are being scanned into an electronic VBMS file without ever being sent to the appeals team. Therefore, the appeals team does not even know an NOD was received unless someone has a reason to review the VBMS file for a different claim, or a Representative contacts us asking about the status of the Veteran’s appeal. Right now, under current procedures, it is very easy to lose control of an appeal in VBMS.

Unfortunately, in the entire claims process, appeals seem to be forgotten. When changes are made to the claims process and/or the programs used to process claims, very rarely is there direction or discussion on how the changes will affect appeals.

While reducing the length of time a Veteran must wait to receive a decision on a claim is very important, it cannot be at the expense of those veterans who are waiting for a decision on an appeal. As an Agency, we must also be focused on breaking the backlog of appeals. Why should a Veteran get a decision on his initial claim in 125 days (VA’s goal), but then have to wait 2 to 3 years, if not longer, for a decision on his appeal?

Thank you again for the opportunity to express to you my personal views of the appeals process and thank you for caring for our nation’s veterans.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AND THE AFGE NATIONAL VETERANS’ AFFAIRS COUNCIL

Overview

The American Federation of Government Employees and the AFGE National Veterans’ Affairs Council (hereinafter “AFGE”), the exclusive representative of employees processing appeals at Veterans Benefits Administration (VBA) Regional Offices (ROs) appreciates the opportunity to share our concerns and recommendations regarding the claims appeals process.

Summary of Recommendations

Decision Review Officers (DROs), employees at the RO level responsible for appeals, should work consistently on appeals issues, rather than being assigned to work on claims developing and rating. AFGE’s response from employees consistently stated that DROs are regularly taken off of working on appeals cases and moved to work on developing and rating cases. This issue arises on a yearly basis, when DROs are diverted from appeals for several months at the end of the year.

VBA should adopt a new work credit system since DROs do not receive proper credit for a significant number of tasks they complete on a daily basis. DROs receive no credit for deferred ratings and other necessary tasks they are required to complete on a daily basis. Consequently, DROs are denied a fair opportunity to meet their performance standards and feel pressured to rush through tasks for which they receive no credit, rather than focusing on the task at hand.

VBA should place a higher emphasis on quality in developing and rating claims. A significant number of errors result from the lack of quality at the Veterans Service Representative (VSR) and Rating VSR (RVSR), leading to more appeals. VBA

must focus on quality as well in order to limit the number of appeals through performance standards and incentives for employees.

DROs need additional training on the appeals process especially when new laws and regulations are enacted. Most DROs reported almost no appeals specific training for appeals.

AFGE urges the Subcommittee to address a worsening morale problem among DROs that is impacting recruitment and retention. DROs are often the face of VBA appeals for the veteran, and expressed frustrations with representing the agency when they reach out to veterans who have been waiting over three years for their appeals case to be processed. The DROs believe that a renewed emphasis from VBA on appeals would help morale and productivity at their ROs.

AFGE received two suggestions from several ROs that we believe the Subcommittee should consider as time saving measures: (1) elimination of the requirement that the veteran elect either a DRO review or a traditional appeal; and (2) shortening the time to submit a Notice of Disagreement (NOD). Employees reported that the appeals are delayed significantly by waiting for the veteran to declare which type of appeal they prefer. Also, veterans regularly wait the a full year to file NODs; if these were required to be filed within a shorter timeframe, the appeals process would move much more smoothly. AFGE believes the Subcommittee should examine these recommendations in depth before implementing any changes.

AFGE surveyed its members processing appeals to address workforce issues. We received responses from the following ROs that are discussed below:

- Portland, OR
- Chicago, IL
- Milwaukee, WI
- Winston Salem, NC
- Denver, CO
- Little Rock, AR
- St. Petersburg, FL
- Montgomery, AL

VBA employees responding to the Subcommittee's request consistently expressed their dedication and sense of purpose in serving the veterans. Over half (52%) of VBA employees are veterans themselves, and many of these employees receive benefits from the VA. Therefore, many have direct personal experiences with the claims process. Despite the many challenges they face, VBA employees uniformly remain steadfast in their goal to serve veterans, work hand in hand with Veteran Service Organizations, and do all that they can to work with VA to lower the unacceptably high backlog of appeals cases.

DROs not working on appeals cases

Nationwide, DROs consistently reported that they are regularly diverted from appeals work to perform other work. Although there appears to be no standardized process for determining when DROs should be diverted to other tasks, employees reported that it has been a regular practice during the last quarter of each year to assign DROs to developing and rating cases. In one RO, a DRO mentioned that some appeals personnel have not worked on appeals in three years, and instead work ratings for the Veterans Service Center.

The inconsistency adds to the backlog of appeals claims. Most ROs reported that they do not have enough personnel to catch up on all of the appeals once their appeals team stops processing appeals.

Several recent VBA policy decisions also contributed to DROs not working on appeals cases. VBA instituted mandatory overtime at every RO through September 2013. Right now, DROs are only allowed to work on developing and rating cases during mandatory overtime. VBA should allow DROs to work on appeals during mandatory overtime as well. Also, following Undersecretary Hickey's recent Fast Letter for processing two year old claims, DROs were consistently moved off of appeals work and pushed into processing the two year old claims.

Broken Work Credit System

DROs do not receive proper work credit for a significant amount of tasks they complete on a daily basis.

For example, deferred ratings occur on a daily basis for DROs. Often times, DROs must send the claim back to the VSR for additional development (e.g. more medical evidence); DROs do not receive no credit for this work (because no appeal action is taken). DROs also have to make complex exam requests with various medical opinions, which can up to several hours depending on the complexity of the issue. It is important to spend time on these issues since the veteran should be assisted and

informed accurately about additional medical evidence they will need for their claim. However, a DRO could spend an entire day working on these cases and receive no production credit for the day. DROs also receive no credit for supplemental development.

DROs also do not receive adequate credit for multi-issue and complex cases. Veterans are regularly filing claims with dozens of issues and the appeals have a similar level of complexity. Employees also are denied sufficient credit for processing cases involving complex claims such as military sexual trauma and TBI.

Employees reported a significant amount of productive time lost due to breakdowns in VBMS. VBMS is in the process of being rolled out nationally. However, the system still has frequent and significant malfunctions, at both the RO and national levels. During VBMS shutdowns or malfunctions, employees receive no adjustment to their work credit requirements for lost production time.

Greater Emphasis on Quality

VBA continues to claim they are placing greater emphasis on quality for work performed by VSRs, RVSRs, and DROs, by pointing to the improved quality numbers. However, by counting issues instead of entire cases when determining, the numbers have improved through this measure alone. While this format for calculating quality is more fair and accurate, it is misleading to say that this demonstrates an improvement in quality.

VBA employees in ROs nationwide reported the continued emphasis on production above all else. This emphasis leads to more mistakes by employees rushing through claims and results in more appeals. The DROs surveyed all reported that many appeals result from errors at the development and rating level and the entire process could be avoided for some veterans with an improvement in quality.

Additional Training on Appeals Process

DROs in each RO described the training for appeals as essentially non-existent. Milwaukee stated that there is no DRO specific training. DROs must consistently keep up with new policies and regulations, but they are not provided adequate time during the day to learn about and absorb this new information. A DRO from Chicago went through appeals training in 2011 in a central location and said the quality was high, but there is no equivalent at the local level.

Most DROs reported that they receive the majority of their training in the same classes as RVSRs, which is redundant and irrelevant to appeals work.

Low Morale

Every RO surveyed reported that morale at their office is particularly low at this point in time. Many times, DROs are the face of the VBA appeals process since they must regularly contact veterans about the status of their appeal. The DROs reported dealing with understandably frustrated veterans who have been waiting years for their appeals decision. VBA employees, 52% of which are veterans, are incredibly dedicated to serving veterans and providing quality and timely work. However, since VBA consistently places less emphasis on the appeals process, appeals at ROs continue to pile up, leaving veterans waiting years for decisions.

The problems with the work credit system also contribute to low morale amongst DROs. DROs are pushed hard on the production side while the emphasis is lost on quality. A DRO from Milwaukee observed that it appears that management is no longer interested in producing quality work, which further lowers the morale of this dedicated workforce.

Potential Time Saving Changes in the Appeals Process

A DRO in Chicago suggested that time could be saved by removing the requirement for the veteran to elect whether or not they want a DRO review or a traditional review. They believed that this process adds at least six months to the appeal process due to the required additional correspondence with the veteran, followed by the case being pushed to the back of the queue (which could be further delayed by additional documentation that comes in during the delay). The Chicago DRO also suggested that if all cases received a DRO review upfront, a lot of the appeals issues could be resolved on the spot without the need for the case to continue through the entire appeals process.

Chicago, Milwaukee, and Winston Salem ROs all reported that the appeal period should be lowered from one year to somewhere between 60–90 days. These offices believed that since veterans already have other opportunities to file appeals after their rating, this will speed up the process overall if they file within 60–90 days.

Thank you for the opportunity to share the views of AFGE and its National VA Council.

THE AMERICAN LEGION

Nationwide, The American Legion has over 2,600 accredited representatives assisting veterans and their dependents seeking benefits from the Department of Veterans Affairs (VA). Additionally, 13 national appeals representatives are employed by The American Legion to represent claimants at the Board of Veterans' Appeals (BVA). Our national appeals representatives fervently advocate on behalf of veterans and their dependents to rectify errors committed by VA personnel during the adjudication process. We are honored to have represented over 698,000 veterans and their dependents in fiscal year 2013 resulting in the awarding of over \$5.7 billion in VA benefits during the fiscal year.

On behalf of National Commander James Koutz and the 2.4 million veterans of The American Legion, we would like to thank this Committee for the opportunity to address the critical issue of the appeals backlog affecting veterans across the nation.

From January 1, 2010 through June 1, 2013, The American Legion has represented 29,542 veterans and their dependents in their quest for veterans' benefits at BVA. Of these claims, The American Legion effectively proved the VA erred or failed to fully develop a claim in 21,632 cases. Of the 21,632 claims, 27 percent of claimants had benefits awarded by the BVA, indicating VA erred in its original adjudication, and only 45 percent of the claims proved to be fully and properly developed, indicating that VA failed in its development process more than half the time.

According to VA's Monday Morning Workload Report published on June 3, 2013, VA states they correctly adjudicated claims with 89.6 percent accuracy over the previous three months. Although the BVA statistics represent a portion of the claims adjudicated at the 56 VA Regional Offices (VAROs) and Appeals Management Center (AMC), we submit the statistics produced by BVA provide a sample of the quality in adjudication nationally at the VAROs. The accuracy statistics as indicated by BVA suggests VAROs are providing quality decisions in less than one out of four claims; these statistics are in stark contrast to VA's published report.

Unquestionably, the appeals process proves time-consuming and frustrating for the veteran population. By the time BVA renders a decision, a claimant will often have spent many years in the appeals process, beginning with enduring the backlog at the VARO. Furthermore, in roughly half of the claims presented to BVA, the claims are remanded with clear instructions to AMC on how the claim should be developed:

Included within a BVA remand, clear instructions are provided to AMC how to proceed with the claim. Instructions often include:

- Providing a veteran with a Veterans Claims Assistance Act (VCAA) notification
- Providing a VA C&P examination
- Gathering information from other federal agencies pertinent to the development of the claim
- Providing the veteran with ample opportunity to supply private records pertinent to the development of the claim

Common reasons for BVA to remand claims include:

- Failure to provide the VCAA notification
- Inadequate VA compensation and pension (C&P) examinations
- Failure by veterans service representatives (VSRs) to properly develop claims, to include considering claims not only as directly related to service, but also manifesting by a previously service connected condition or aggravated by a previously service connected condition

Upon the completion of the necessary development of the claim, AMC renders a decision. A veteran has the right to appeal any decision provided by AMC; if a claim is denied, the claim is automatically returned to the BVA for review. Again, The American Legion's national appeals representatives will review the evidence, prepare an informal hearing presentation, and submit the claim to BVA for their review.

Unfortunately, despite clear instructions given by BVA administrative law judges within its original remand, The American Legion's representatives frequently successfully argue that AMC failed to comply with the clear instructions resulting in yet another remand. Insiders familiar with this process of repeated remands for the same claim refer to this endless cycle as the "perpetual remand wheel" where a claimant has to endure even more months, and often years, of claim development

prior to receiving a final decision from BVA. Of course, this process can continue well beyond BVA's final decision if the veteran elects to appeal BVA's decision to the United States Court of Appeals for Veterans Claims.

The heart of this matter largely lies in the manner VA initially adjudicates its claims. VA Secretary Eric Shinseki and Undersecretary for Benefits Allison Hickey have repeatedly stressed the need for VA to improve its accuracy in claims' adjudication. VA often points to the accuracy percentage provided in the Monday Morning Workload Report; however, those statistics are fluid. If a claimant appeals a VA rating decision, and it is ultimately remanded or granted, then logic would dictate that the claim was inaccurately rated by the VARO, and the accuracy statistic would be adjusted accordingly. Again, we understand that BVA adjudicates a small portion of claims compared to VAROs; however, if VA desired to arrive at a more accurate statistic regarding claims' adjudication accuracy, the statistic should reflect grants and remands by BVA. In reality, VA would not be able to truly ascertain the quality of its adjudications unless each and every veteran and dependent appealed each decision rendered by VAROs.

VA has a daunting challenge forecasted for their future. Secretary Shinseki has assured the veteran community that claims will be processed within 125 days and with 98 percent accuracy. Whether an individual wishes to lend credence to VA's Monday Morning Workload Report statistics regarding accuracy or the statistics formulated by BVA, it is clearly evident VA needs to vastly improve its adjudication accuracy to meet the Secretary's objective.

It is also necessary to discover methods to expedite the manner that a veteran can receive a positive nexus opinion linking a current diagnosed condition to either military service or a previously service connected condition. Many veterans utilize the VA healthcare system for treatment. Under the current structure, a VA primary care provider may treat the condition; however, the provider may not provide a nexus statement regarding the condition that may allow veterans to become service connected. This results in a cumbersome process; a veteran has to file for the condition and wait until a veterans' service representative schedules the veteran for a VA C&P examination. It is particularly frustrating for veterans when their primary care provider has indicated that the condition could be service connected, and the provider is unable to provide supporting medical opinions, including opinions relating to causation of a condition, when it is medically possible to do so.¹⁹

Resolving the timeframe that a claim waits in appeal status is largely connected with the manner VA originally adjudicates claims. If VA properly develops claims and renders a decision that is in accordance to the laws and regulations governing veterans' law, then logic would dictate that fewer appeals would occur thereby reducing the backlog of appeals. Additionally, if AMC staff would adhere to the remand instructions prepared by BVA, fewer cases of multiple remanded claims for development would need to occur.

The American Legion again thanks the Committee for its diligent attention to the claims process. For additional information regarding this testimony, please contact Mr. Ian de Planque at The American Legion's Legislative Division, (202) 861-2700 or ideplanque@legion.org.

DISABLED AMERICAN VETERANS

Chairman Runyan, Ranking Member Titus and Members of the Subcommittee:

On behalf of the DAV (Disabled American Veterans) and our 1.2 million members, all of whom are wartime wounded and injured veterans, thank you for asking DAV to submit testimony to the Subcommittee for today's hearing examining the multi-layered processes and procedures available to veterans who believe that their claims for benefits have not been properly or fully granted by the Veterans Benefits Administration (VBA). As the nation's leading veterans service organization (VSO) assisting veterans seeking disability compensation and other benefits, DAV has tremendous experience and expertise relating to the processing of claims as well as the various ways veterans may appeal adverse actions and decisions.

Mr. Chairman, over the past several years, much attention has been rightly focused on efforts to reform VBA's claims processing system and reduce the unacceptable backlog of pending disability compensation claims. DAV continues to advocate that the only way to truly address both of these problems is by creating a new system and culture focused on getting each claim done right the first time.

¹⁹Resolution No. 24, OCT. 2008

However, even if VBA is able to reach its overly ambitious targets of all claims completed within 125 days at 98 percent accuracy that will still leave a large number of decisions that veterans will choose to appeal in some manner. Just as the number of claims is expected to continue rising in the coming years, particularly as more combat veterans return from battlefields across the globe and separate from service, so too are the number of appeals projected to rise commensurately. And just as there is an unacceptable backlog of claims pending at VBA, there is also an unacceptable backlog of appeals awaiting decisions from the Board and the Court.

To fulfill our mandate of service to America's wounded, injured, and ill veterans and the families who care for them, DAV employs a corps of more than 260 National Service Officers, all of whom are wartime service-connected disabled veterans who successfully complete their rigorous training in concert with VA's Vocational Rehabilitation and Employment Service. The military experience and personal claims coupled with treatment experiences of DAV NSOs through military health care and VA not only provide a significant knowledge base, but also help promote their passion for helping other veterans through the labyrinth of the VA system. DAV NSOs are situated in all VA regional offices (VARO) as well as in other VA facilities throughout the nation.

During 2012, DAV NSOs interviewed over 187,000 veterans and their families; reviewed more than 326,000 VA claims files; filed over 234,500 new claims for benefits; and obtained more than \$5.1 billion in new and retroactive benefits for the wounded, injured, and ill veterans NSOs represented in more than 287,000 VA rating actions.

To further assist veterans whose claims are denied or otherwise not fully satisfied, DAV employs National Appeals Officers (NAOs) located at the Board of Veterans' Appeals (Board) whose duty is to represent veteran claimants in their appeals before the Board here in the nation's capital. In FY 2012, our cadre of NAOs provided representation in 31.1 percent of all appeals decided before the Board, a caseload of approximately 13,789 appeals. Nearly 47 percent of the cases represented by DAV resulted in remands for further development. These remands resulted in additional consideration or development for over 6,400 claimants who had appealed cases that were not adequately considered by VARO's. In more than 29 percent of the cases, involving over 4,000 appellants represented by DAV, the veteran claimants' appeals were allowed, and the VARO denials were overturned. This means that approximately three-quarters of the appeals represented by DAV NAOs resulted in original decisions being overturned or remanded for additional development and re-adjudication.

When the Board determines a case requires further development before it can render a final decision, the cases are remanded to the Appeals Management Center (AMC) in Washington, D.C., with explicit instructions on the necessary actions. DAV NSOs collocated at the AMC's offices ensure that those cases for which we hold power-of-attorney (POA) are properly reviewed and re-adjudicated by AMC staff and that the Board's remand requirements are successfully met.

In addition, once the Board reaches a final decision veteran claimants have the right to appeal a Board decision to the United States Court of Appeals for Veterans Claims (Court). While DAV does not employ attorneys to provide representation before the Court, we do work closely with two private law firms that have agreed to provide pro bono services to veteran claimants pursuing their appeals. In 2012, these pro bono attorneys offered free representation before the Court in nearly 1,300 denied appeals and provided representation in over 1,000 of those cases. Since the inception of DAV's pro bono program, our attorney partners have made offers of free representation to more than 3,700 veteran claimants and have provided free representation in over 2,200 cases.

As we continue to state, if VBA can create a culture of deciding each claim right the first time, it will save tremendous time and resources for both veterans and the Department. The best way to resolve differences between what a veteran claimant seeks and what VBA provides is at the earliest stage in the process. By the time it reaches the Board or the Court, it is typically years after the claim was originally filed. For that reason, any review of the appellate process should begin with opportunities for resolution at the VARO level.

Actually, the first opportunity to address concerns or challenge a VBA claims decision is by NSOs who are given 48 hours to review claims decisions before they are formally issued. Our NSOs examine the evidence considered, the decision rendered, and the reasons and bases stated for that decision. When we disagree with the decision, our NSOs can discuss directly with the VBA rating specialist who rendered the decision in order to discuss the particulars of the case and request that it be reconsidered before being issued. If still not satisfied, an NSO can bring the case to a Coach (supervisor), service center manager, or even the VARO Director to con-

tinue to seek changes. In some cases, NSOs are successful in pointing out evidence, facts, rules, regulations and/or laws that have not been properly applied, thereby resulting in a better, more accurate decision being issued by the VARO. Unfortunately, there are still too many instances in which the VARO effectively ignores valid arguments put forth by NSOs, resulting in unnecessary delays and denials of claims.

Once a decision is rendered by the VARO, the veteran has the right to appeal the decision to the Board and has one year from the date of notification to do so in the form of a Notice of Disagreement (NOD). DAV NSOs assist veteran claimants in initiating the NOD and all other steps at the VARO level. Because the majority of veteran claimants intent on appealing the VARO's decision submit their NOD well within the one year period, a false belief has come to light within VBA that a reduced appeal period of 180 days is all that is necessary. In fact, VBA recently testified before the Senate Veterans' Affairs Committee that the appeal period should be shortened to 60 days from the date of decision notification. DAV strongly disagrees with shortening the appeal period because many veteran claimants need the entire current one-year period to gather any additional supportive evidence. As such, DAV is opposed to any attempt to erode this important aspect of the appellate process simply for statistical gains for VBA.

In filing the NOD, the claimant is provided with the option to seek additional review of the decision at the VARO by a Decision Review Officer (DRO) in addition to a formal appeal to the Board. In most cases, our NSOs recommend that veteran claimants utilize the DRO process because a DRO has de novo review authority and can overturn the decision, whereas the Board is limited in its scope of review. The choice to pursue resolution through the DRO process resides with the veteran claimant and if they do not seek DRO resolution the appeal will continue to the Board; however, the DRO process is typically much quicker than an appeal before the Board and allows for additional opportunity for resolution at the VARO level.

A major concern that continues to plague the DRO process is the assignment of routine claims work to DROs by VARO leadership who are focused on reducing their pending workload. This is not how the process was intended to work, as these skilled individuals should be performing actions within the limited scope of appeals. In fact, prior to implementing the DRO process years ago, VAROs had specific individuals working as hearing officers, who amongst other duties would regularly conduct local hearings following the submission of a NOD from the veteran claimant. If requested by the veteran claimant, the hearing officer would conduct the hearing and render a new decision in the case. Many felt this process to be more beneficial to those veteran claimants who had representation; for this reason, as well as hearing officers becoming inundated with work, the DRO process was created to be more expansive and beneficial to all veterans.

Nonetheless, as stated, DROs are often not performing only appeals related actions; rather, they are routinely pulled away from their respective duties to assist with development and rating actions normally performed by veteran service representatives (VSRs) and rating veteran service representatives (RVSRs). In order for the DRO process to be fully effective as envisioned, VAROs must not divert DROs from their intended work to help meet local work quotas and targets. If the veteran claimant remains unsatisfied with the DRO's decision, the appeal will continue to the Board.

Additionally, when submitting a VA Form 9, Appeal to Board of Veterans' Appeals, thereby perfecting the appeal and outlining the basic contentions and reason for appeal, the veteran claimant can request a formal hearing before the Board. Hearings are conducted either in person at the Board with the veteran claimant bearing the cost of travel; a hearing before the travelling section of the Board at the local VARO; or a hearing before the Board by way of live videoconference, which are usually set up for the veteran claimant at the nearest VARO. The first two offer in-person or face-to-face interaction with the Board member but there are challenges in terms of cost and delay.

As stated, the veteran claimant can appear before the Board in Washington, DC, but the veteran claimant must bear the cost of travel. Should the veteran claimant wish to appear before the travelling section of the Board at the nearest VARO, the time it takes to actually have the hearing can be 18 months to 2 years because of the amount of veteran claimants requesting this type of hearing and the Board's limited ability to hear cases during the periods when they are at VAROs, usually about 100 per week.

The more expedient type of hearing before the Board is the videoconference hearing. While this type of Board hearing has been slow in gaining wide acceptance, nearly 40 percent of all Board hearings last year were conducted via videoconference. In fact, DAV recommends this type of hearing to all veteran claimants

who wish to appear before the Board as the technology and equipment used between the Board and VARO is quite satisfactory and the decision results are not adversely impacted. Furthermore, DAV supports the use of videoconference hearings as the default choice for hearing by the Board, provided the veteran claimant retains the absolute right to choose an in-person hearing before the Board in the alternative.

The Board makes final decisions on behalf of the Secretary on appeals from decisions of local VAROs. It reviews all appeals for benefit entitlement, including claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and health care delivery, primarily dealing with medical care reimbursement and fee-basis claims.

The Board's mission is to conduct hearings and issue timely, understandable, and accurate decisions for veterans and other appellants in compliance with the requirements of law. While the BVA controls jurisdiction over a host of issues, historically, 95 percent of appeals considered involve claims for disability compensation or survivor benefits.

In FY 2012, the Board conducted 12,334 hearings, about 2,400 fewer than the prior year, and issued 44,300 decisions, about 4,300 less than in FY 2011. The average cycle time from receipt to decision was 117 days, two days fewer than the year prior. The Board's accuracy rate for FY 2012 was reported at 91 percent, about the same as the prior year. While the number of appeals filed fell from 38,606 to 37,326 in FY 2012, the number of appeals docketed at the Board increased from 47,763 in FY 2011 to 49,611 in FY 2012.

Based on historical trends, the number of new appeals to the Board averages approximately five percent of all claims received; as the number of claims processed by the VBA is expected to rise significantly, especially with the new Veterans Benefits Management System (VBMS), so too will the Board's workload rise accordingly. It is worth noting that in both FY 2011 and FY 2012 a significant number of VARO employees who would otherwise have normally worked on certifying appeals to the Board were instead focused on processing Nehmer and other Agent Orange-related cases, creating a backlog of appeals to be certified.

In addition, while the VBA is continuing the implementation of its new organizational model and VBMS system, the focus on processing claims has also shifted away from certifying appeals to the Board. With the Nehmer work now finished, and as the transformation process winds down over the course of the year, the VA is expected to turn to the backlog of pending appeals to be certified. This will undoubtedly lead to a surge of new appeals being sent to the Board in the next couple of years, further impacting the Board's already resource-constrained capacity to handle the rising workload.

Yet, despite the fact that workload is rising, and is projected to grow significantly as the VAROs begin to process both the backlog of claims and pending appeal certifications, the budget provided to the Board has been declining, forcing it to reduce the number of employees. Although the Board had been authorized to have up to 544 FTEEs in FY 2011, its appropriated budget could support only 532 FTEEs. In FY 2012, that number was further reduced to 510. Recently, the Board was provided an additional \$8 million, which has allowed them to begin increasing staff. As a result, it is our understanding the Board recently added new staff and will continue to do so with a projected FTEE of 538 by the end of FY 2013 and an FTEE of 618 by end of FY 2014. This increase in staffing will significantly help the Board reduce its pending caseload; however, we are concerned it may not be enough to keep pace with projected future increases in workload.

Moreover, this increase does not make up for the downward trend over the past several years at the pace the Board's workload is projected to rise. Additional workload is also expected to come from cases recently decided by VBA through its provisional rating decision program, wherein all cases older than two years were identified and are in the process of being rated before the end of June, as well as the paperless VBMS system directed at producing ratings quicker. Based on the expected workload increase in FY 2014, and even adjusting for productivity gains, we believe the Board is going to experience an increase of appeals from the current caseload of approximately 45,000 to a projected caseload of approximately 112,000 by FY 2017.

Concurrent with staffing increases, the Board will need to ensure that it has sufficient office space to house new FTEE. We are concerned about reports that as a result of VA initiatives to consolidate and eliminate excess office space, the Board may not have sufficient space for the planned staffing increase. Furthermore, in order for the Board to work efficiently, it will be necessary to have VBA's new IT system, the VBMS, fully deployed and integrated with both VBA and the AMC. VBA must prioritize the final development and implementation of VBMS to the Board.

Beyond the Board, the veteran claimant has the right to appeal adverse decisions to the United States Court of Appeals for Veterans Claims (Court). This review process allows an individual to challenge not only the application of law and regulations to an individual claim, but also to contest whether VA regulations accurately reflect the meaning and intent of the law.

Just as the Board can remand cases back to the AMC or VARO, the Court has the ability to remand cases back to the Board when it finds errors in the application of the laws and regulations, affording additional opportunity for the claim to be favorably resolved. However, in some instances, the Court may issue a remand without resolving all issues related to the appeal. This can have the unfortunate result of further delaying what has already been a long and arduous process for a veteran or survivor seeking benefits. To help ensure that claimants that have already been waiting for years do not unnecessarily wait longer, Congress should consider amending Section 7261 of title 38, United States Code, so that the Court is required to render a decision on every legal issue raised by the appellant if it satisfies three conditions:

1. The Court has proper jurisdiction under section 7252 of title 38;
2. The issue does not require further adjudication or fact-finding below; and
3. The issue does not depend on the outcome of the remand of another issue before the Court.

During the 21 years since the Court was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court that does not reside in its own courthouse. The Court should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress allocated \$7 million in FY 2008 for preliminary work on site acquisition, site evaluation, preplanning for construction, architectural work, and associated other studies and evaluations. No further funding has been provided. Congress should provide all funding as necessary to construct a courthouse and justice center in a location of honor and dignity to the men and women who served and sacrificed so much to this great nation.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, I would like to thank you for the opportunity to provide testimony for today's hearing.

Current data shows 250,845 appeals are controlled in the Veterans Appeals and Locator System (VACOLS) which tracks appeals pending in the Department of Veterans Affairs (VA) regional offices, pension centers and the Appeals Management Center.¹ Appeals have been at these levels for at least the last 18 months without significant variation.

It is not just the number of pending appeals which is astounding. In its annual report for FY 2012, released in February, 2013, the Board of Veterans' Appeals (BVA) said that it took, on average, 1,040 days for a veteran to receive a BVA decision after filing a substantive appeal.² That is 2.8 years. Even worse, the appeal starts for the claimant/appellant hundreds of days earlier when he/she files a Notice of Disagreement.

Two stage appeals process

The VA runs a two stage appeals process. When VA issues a decision, a claimant generally has one year in which to decide to appeal part or all of the decisions made by VA. The clock for VA starts when a Notice of Disagreement (NOD) is filed. The VA is supposed to place the NOD under control within 7 days of receipt.³

The NOD is referred to a VA employee with decision making authority equal to or higher than the individual who made the original decision. Most appeals deal

¹Monday Morning Workload Report; June 10, 2013 showing appeals data from May 11, 2013. <http://www.vba.va.gov/REPORTS/mmwrr/index.asp>.

²Report of the Chairman, Fiscal Year 2012; February 2013, page 19. <http://www.bva.va.gov/docs/Chairmans—Annual—Rpts/BVA2012AR.pdf>.

³While VBA requires claims be put under control within 7 days of receipt, the reality is that some offices take much longer to identify and control appeals. Appeals Design Team Briefing, January 2013, page 2.

with decisions in disability compensation claims. NOD's in these cases are referred to either a rating specialist or a Decision Review Officer. NOD's filed in non-rating cases are usually assigned to senior Veteran Service Representatives.

Once received, an NOD will pend until a decision maker reviews the original decision and, if they do not change it, issue a Statement of the Case (SOC). An SOC essentially restates the decision with added material outlining the laws and regulations pertinent to the decision. For reasons discussed below, it can take scores of days for a veteran to receive an SOC.

VBA sends a Substantive Appeal, VA Form 9, with the SOC. The claimant has the remainder of the one year appeal period or 60 days, whichever is longer, to return a completed Form 9. Failure to submit the Form 9 within this period ends the appeal. Many claimants decide not to continue their appeal at this point, either because they have a better understanding of why the decision was made in their case, or because they become frustrated with delays and legal sounding boilerplate and decide to give up. However, many tens of thousands decide to continue their appeals and submit the Form 9.

If the Form 9 is received within the required period the appeal continues and is not closed until one of three things happens: the claimant withdraws their appeal; VA grants the maximum benefit allowed by law; or the BVA makes a decision. It is only this period, from submission of the Form 9 to the issuance of a BVA decision, which is covered by the 1,040 day average reported by the BVA.

To look at this differently, VBA reported that in FY 2011 the Houston Regional Office averaged over 1,444 days from receipt of a NOD to the day the appeal is certified to the BVA for their consideration.⁴ It is apparent, then, that while the BVA may take over 250 days, on average, to complete its work, most of this extraordinary years-long appeals process is spent in VA regional offices, waiting.

VA regional offices are where appeals go to wait

For much of the last two decades appeals have been the step-child of VA claims processing. These claimants already have a decision from VA. They may not like part or all of what VA decided, but they have a decision. There are currently 1.75 million veterans and other claimants who are waiting for VA to take action on their original disability claim, a reopened claim, a claim for an increase, accrued benefits, burial benefits, a claim to add a dependent...the list goes on. VA's workload is not just the 851,000 disability benefit claims VA routinely talks about.⁵ However, these claimants do not have a decision.

Since at least the early 1990's, every time VBA decides it must reduce the backlog, local managers divert most personnel assigned to appeals to assist in the project. Since the focus is on the backlog, Members of Congress and the media fail to notice that appeals are not being worked. The natural consequence of this choice allows the appeals backlog to simultaneously grow, and grow older. Until last year when VBA created Appeal Teams, most regional office appeals operations were understaffed. Even when Decision Review Officers were allowed to work appeals, they had huge caseloads and insufficient support staff to handle the work.

Inattention to appeals, pressure to move other work, and under staffing of appeals operations created inefficiencies which spun out of control. For instance, a high level VBA official involved in appeals recently related that certain work management practices facilitated one segment of the work at the expense of appeals. What he described was this: A veteran submits an NOD on one issue while submitting a supplemental claim on a different issue. Since the NOD and claims material were screened by personnel trained to develop claims, they would initiate development first and not submit the NOD to the appeals team. As a result, months would go by before someone else noticed the NOD and placed it under control.

One problem appeals processing has in common with claims processing is development. Many claimants either submit additional evidence or identify additional evidence during the appeals process. Additional evidence is rarely sufficient by itself to allow VA to grant the benefit sought on appeal. As a result, VA is required to order a VA examination. If the claimant identifies additional evidence, VA is required to assist the claimant in obtaining it. Identifying exactly the right action to take to properly develop an appeal remains a challenge for VA. In FY 2012, the BVA remanded for additional development 45.8 percent of the appeals it considered.⁶ A large portion of these appeals were remanded to correct development deficiencies that were not addressed prior to shipping the appeal to the BVA.

⁴ Appeals Design Team Briefing, January 2013, page 2.

⁵ Monday Morning Workload Report.

⁶ Report of the Chairman, Fiscal Year 2012; February 2013, page 22.

Discussion

Many organizations and individuals have their own ideas about what is wrong with the appeals process and offer their own ideas for what should be done to fix it. While some would argue that the unique set of veteran friendly laws create obstacles to efficient appeals processing, or the creation of the Veterans Court in 1988 has been an engine of redefinition and change to the regulations and policies enacted by VA in a pre-Court era, or point to the dearth of attorneys representing claimants before the Board,⁷ the reality is that VBA has devoted too few resources, created too many process inefficiencies, and failed to timely and properly develop too many cases for the appeal process to be anything but dysfunctional. The VFW believes that if these three things are properly addressed VBA should be able to substantially shorten the time it takes to move an appeal from receipt of an NOD, issuance of an SOC, process a Form 9 and certify a case to the BVA.

VBA recently concluded a one year appeals pilot at the Houston Regional Office where many of these issues appear to have been addressed. While we need to study the process more closely to ensure that veterans were not harmed during this project, we are encouraged by what VA has done. VA reports that during this pilot they were able to shave 1,000 days off the average time it took Houston staff to process appeals from receipt of an NOD to certification to the BVA. While they did not hit their target, they made remarkable strides in improving communication to claimants and expediting appeals.

Unique system of laws

“The veterans’ benefits system has been calibrated with uniquely pro-claimant principles.”⁸

In any discussion concerning the Department of Veterans Affairs, it is critical that all parties understand that Congress created a unique set of pro-veteran policies when establishing programs for veterans and their families. Principles which are common throughout the rest of the law are intentionally absent or relaxed in laws dealing with veterans’ benefits.

While these laws may create challenges for VA, they are not insurmountable challenges. We posit that VBA has yet to put sufficient effort into conducting development efficiently and effectively. Development regimens are too complex, variables too numerous, training too ineffective and oversight is largely absent.

VA has argued that if it could be only allowed to shorten waiting periods from 60 days to 30 days, shorten the appeal period from one year to 6 months, that it would be able to process claims more quickly with higher quality. We believe that two things are wrong with this approach. First, VA seeks to penalize veterans and other claimants for its own inefficiencies and inability to properly develop and control claims and appeals. Second, VA managers would have you believe that the solution to its problems rests with Congressional mandates and not with its own inability to establish effective procedures, conduct meaningful training, perform adequate and timely quality reviews, and ensure consistent managerial oversight of the appeals process. The VFW strongly urges Congress to compel VA to do its job, and do it correctly, the first time, and not to further restrict “unique set of pro-veteran policies” enacted by you to ensure that veterans receive the benefits they have earned through their service to the American people in both peace and war.

Mr. Chairman, this concludes my testimony.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, VFW has not received any federal grants in Fiscal Year 2013, nor has it received any federal grants in the two previous Fiscal Years.

VETS FIRST

Chairman Runyan, Ranking Member Titus, and other distinguished members of the Subcommittee, thank you for the opportunity to submit for the record our views concerning the appeals process for veterans’ disability benefits claims.

⁷We would be remiss if we did not point out that while attorneys obtained grants in 30.1 percent of the cases decided by the BVA in FY 2012, three veteran service organizations, including the VFW, obtained better results. Report of the Chairman, Fiscal Year 2012; February 2013, page 23.

⁸*Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)”

VetsFirst, a program of United Spinal Association, represents the culmination of over 60 years of service to veterans and their families. We provide representation for veterans, their dependents and survivors in their pursuit of Department of Veterans Affairs (VA) benefits and health care before VA and in the federal courts. Today, we are not only a VA-recognized national veterans service organization (VSO), but also a leader in advocacy for all people with disabilities.

The backlog in adjudicating a veteran's claim for disability benefits has been well documented. Unfortunately, the backlog for appealing a claims decision is just as, if not more, egregious. VetsFirst believes that we must look not only at the backlog in both the adjudication of initial claims and the appeals process but also the impact that each process has on the overall claims backlog. For the purposes of this testimony, we will focus on that part of the appellate process that involves the regional offices and the Board of Veterans' Appeals (BVA or Board).

Appealing a claim for veterans benefits is a lengthy process that begins when a veteran receives a decision on a claim that he or she disagrees with and files a Notice of Disagreement (NOD) with the regional office. Upon receipt of the NOD, the regional office will review the veteran's claim. The veteran has the right to a hearing with a Decision Review Officer (DRO) before the regional office issues the Statement of the Case (SOC). Following the issuance of the SOC, if the veteran still disagrees with the decision, then he or she must perfect his or her appeal to BVA by filing a substantive appeal, a VA Form 9. Once filed, the regional office reviews the case again before finally certifying it to BVA. From there, the Board will review the case and render a decision, which may include remanding the case back to the regional office for further action.

The backlog in processing benefits claims and appeals has continued to grow in recent years. The VA's Office of Inspector General (OIG) reported in a May 2012 report¹ that the inventory of appeals had increased more than 30 percent between fiscal year 2008 and fiscal year 2010. The OIG also reported that the inventory of compensation claims increased by 40 percent.

According to the report of the chairman of the Board for fiscal year 2012,² BVA issued 44,300 decisions during that fiscal year. Excluding the time a case is pending with a VSO for preparation of a written argument, BVA's average appeals time (from the time received to the time of decision) was 117 days. The total average appeals time for BVA to render a decision, 251 days, represents a fragment of the time an appellant must wait for a decision from BVA.

Prior to being received by BVA, a substantial period of time has already elapsed. From the time the claimant files an NOD to the issuance of an SOC takes an average of 270 days. The average veteran then takes 40 days to return the VA Form 9. After receiving the appeal request, it takes an average of 692 days for the regional office to certify the appeal to BVA.

The OIG's report found that of the eight regional offices that were audited only one processed NODs within the 125 day average set by VA policy. The actual range in processing times was 120 to 448 days. VA policy also seeks to have all appeals certified within an average of 125 days. Specifically, for each SOC and SSOC that the regional office completes the Veterans Benefits Administration (VBA) allows the regional office 125 days. For the eight regional offices reviewed, the goal set by VBA for certifying appeals ranged from 153 to 195 days. The actual averages for certifying appeals for these offices ranged from 236 to 1,219 days.

We currently represent a veteran whose appeal illustrates the delays that many veterans face in receiving benefits due to the appeals backlog. On June 18, 2009, the veteran appealed a May 1, 2009, rating decision. The regional office issued an SOC on October 23, 2009. In December 2009, the veteran submitted a VA Form 9 appealing the May 1, 2009, denial. On January 14, 2011, the veteran submitted additional medical evidence that we believe will allow the regional office to grant his claim through an SSOC. To date, neither the veteran nor our organization has received an SSOC or any information regarding the certification of his substantive appeal.

The OIG's report found that, "VBA's management of appeals was ineffective in providing timely resolution of veterans' appeals." The OIG's conclusion resulted in part from the assertion that VBA failed to ensure adequate staffing to address appeals. In addition, regional offices failed to make adjudicating appeals a priority for DROs and rating specialists.

The DRO position was deployed nationwide in 2001 in an attempt to expedite the appeals process and limit the number of claims that are ultimately appealed to

¹Department of Veterans Affairs Office of Inspector General, Veterans Benefits Administration: Audit of VA Regional Office's Appeals Management Process (May 30, 2012).

²Department of Veterans Affairs, Report of the Chairman: Fiscal Year 2012.

BVA. Veterans who wish to have their claims reviewed by a DRO are required to affirmatively select that option. A 2006 VBA study group recommended that all NODs should be reviewed by a DRO. That suggestion was rejected because it would be too costly. The VA's OIG has also asserted that appeals delays occurred because DROs do not review all appeals.

VetsFirst believes, however, that there are some claims for disability benefits that a regional office will almost never grant. An example of such a claim might be one for stateside exposure to Agent Orange, which has been granted by the Board. In those cases, the veteran should be allowed to go directly to the Board without having to endure a lengthy regional office appeals process.

According to VA's OIG, another advantage of requiring a DRO review of all appeals would be eliminating the requirement to send the appellant an appeal election letter. Eliminating this step would save approximately 60 days. VBA has recently implemented the use of an optional, standardized NOD form, VA Form 21-0958. However, this form does not provide the appellant the opportunity to choose a DRO review. At the very least, adding the election to any current or future NOD form would also eliminate this need.

We are concerned, however, that DROs spend too little time actually working on appeals. After creating the DRO position, VBA allowed DROs to have other duties not related to appeals. These other duties include training other staff and serving as a second signature on appeals. Although initial claims processing is extremely important, VBA cannot sacrifice those veterans whose claims are waiting in the appeals process. DROs' focus should be on processing appeals.

Requiring DROs to focus on appeals will help to ensure that appeals move more quickly. We agree with the VA's OIG that cases should be reviewed within 60 days of receiving the NOD to ensure that any needed additional information to review the appeal will be requested in a timely manner. We believe that this should be a statutory requirement to ensure that action on an appeal is not unnecessarily delayed.

We also believe that a statutory requirement to certify an appeal upon receipt of a substantive appeal within a specified number of days is needed to further address the overwhelming delay in the appeals process. We suggest that this period be statutorily reduced to 120 days in all applicable appeals. If the regional office is unable to meet the deadline, then they should be required to inform the veteran, the veteran's representative, and BVA of the delay and explain the nature of the delay. VBA should also be required to report to Congress annually regarding the number of cases in which regional offices were unable to meet their deadlines, the types of cases, and the number of delays by regional office, along with action steps for reducing or eliminating the need to delay appeals.

Reducing the amount of time a veteran waits for certification of his or her appeal will also lead to other benefits. It will reduce remands that occur due to a veteran's medical exam being outdated and not allowing for proper adjudication of the appeal. It will also reduce the need for regional office personnel to issue multiple SSOCs. Specifically, we believe that the need for multiple SSOCs will drop dramatically, because significantly reducing the number of days to certification will reduce the likelihood that additional information will be obtained and submitted.

A copy of the regional office's Certification of Appeal, VA Form 8, should also be provided to the veteran and his or her representative. Sharing this form will allow the regional office to address any problems or misunderstandings regarding the appeal before the veteran's file is transferred to the Board. We believe that this process will provide another avenue to reduce adjudication time where there is a disagreement regarding the issues on appeal.

Although there are many ways to expedite review, the regional offices' review process must be thorough. Deficiencies in claims adjudication that will lead to remands must be addressed earlier in the appellate process. Otherwise, veterans' claims for benefits will be needlessly delayed.

According to BVA, in fiscal year 2012, the average time for an appeal that was remanded for further action was 445 days. One of the goals of BVA for fiscal years 2013 and 2014 is to eliminate avoidable remands. We agree that resolving appeals properly at the earliest possible stage is critical to eliminating the need for an appeal to BVA and a subsequent remand to address an error that should have been addressed earlier by the regional office.

We believe that BVA must continue to train DROs to ensure that they are accurately reviewing claims that could be addressed at the regional office. Claims that clearly lack a valid exam, for example, should be addressed by the DRO. Veterans should not have to wait through a lengthy review process to get to the Board to receive a remand for a new exam.

BVA continues to closely track the reasons for remands. This data is available to all VA components for management and training. We believe that this data must be transparent and used to develop publicly available metrics that will reduce avoidable remands.

VetsFirst believes that the appeals process at the Board could also be modified to expedite a veteran's appeals. For example, veterans who include a legal argument with their appeal should be given the opportunity to advance on docket. Currently, most cases are adjudicated in docket order. Veterans who have already provided all of the information that they wish to provide should not be required to wait. Such a process would encourage veterans and their representatives to provide the legal argument earlier in the process in the same manner that the fully developed claims process promotes ready to rate claims in the initial claims process.

Appeals from veterans who are of advanced age, suffering severe financial hardship, or seriously ill may under regulation already be advanced on docket. However, that advance does not continue for appeals that are remanded to the appeals management center or the regional office. Although VBA has recently testified that claims filed by veterans who are homeless, terminally ill, or Medal of Honor recipients or were Prisoners of War are processed as expeditiously as possible, there is no similar regulatory or statutory protection for these claims. We believe that veterans who are advanced on docket at the Board due to one of the criteria laid out in the Board's regulation should continue to be advanced to the resolution of their appeal.

Because the Board is an important component of the full claims process, we also hope that VA is truly working to ensure that BVA's needs have been and will continue to be considered in the development and implementation of the Veterans Benefits Management System (VBMS). VA has stated that VBMS is important to streamlining the claims process and reducing the backlog. Ensuring that the full claims process, including the appeals process, is able to benefit from efficiencies inherent in an electronic records management environment is crucial to addressing issues that contribute to the overall backlog.

Greater accountability for ensuring that appeals do not languish at either the regional office or the Board is needed. Veterans who file appeals need to receive their duly owed benefits as much as

those who are filing initial claims. The appeals process deserves more attention because it is an integral part of the process veterans and other beneficiaries must navigate to receive compensation or other benefits. We believe that there are important efficiencies that can be implemented that would not only expedite the process but also ensure a quality decision. Without a quality, timely review of a veteran's appeal, his or her claim will only continue to cycle through the remainder of the appeals process. For issues that could have been addressed earlier in the appellate process, this is a particularly troubling result for far too many veterans.

Thank you for the opportunity to submit for the record VetsFirst's views regarding the appeals process of veterans' disability benefits claims. We are ready to work in partnership to ensure that all veterans are able to receive the benefits in a timely manner that allow them to reintegrate in to their communities and remain valued, contributing members of society.

Information Required by Clause 2(g) of Rule XI of the House of Representatives

Written testimony submitted by Heather L. Ansley, Vice President of Veterans Policy; VetsFirst, a program of United Spinal Association; 1660 L Street, NW, Suite 504; Washington, D.C. 20036. (202) 556-2076, ext. 7702.

This testimony is being submitted on behalf of VetsFirst, a program of United Spinal Association.

In fiscal year 2012, United Spinal Association served as a subcontractor to Easter Seals for an amount not to exceed \$5000 through funding Easter Seals received from the U.S. Department of Transportation. This is the only federal contract or grant, other than the routine use of office space and associated resources in VA Regional Offices for Veterans Service Officers that United Spinal Association has received in the current or previous two fiscal years.

PARALYZED VETERANS OF AMERICA

Chairman Runyan, Ranking Member Titus, and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our views on the situation faced by thousands of veterans awaiting decisions

on their appeals for veterans' benefits. This issue has been challenging the Department of Veterans Affairs (VA) for years and PVA appreciates you conducting this hearing to try and find answers. However, answers without action is meaningless.

With much of the discussion focusing on the VA disability claims backlog and the litany of initiatives launched by the Veterans Benefits Administration (VBA) to address it, very little attention has been placed on the appeals process. However, the downstream effects of the backlog, which now sits at over 613,000 claims, fall to the jurisdiction of the Board of Veterans Appeals where nearly 43,000 appeals now await adjudication. For veterans who had endured the wait associated with backlogged claims, many face a new waiting game that will last 251 days on average once those claims become appeals. The current remand rate now sits at 46 percent, which means nearly half of appeals are returned to VBA due to error or incompleteness. This also means those appeals will spend an average of 251 days in the process plus the time it takes to fulfill a remand order. This can take months or even years in some cases.

PVA has identified a number of reasons for the appeals backlog. Chief among them is the number of appeals that have to be sent back, or remanded, to VBA for additional development. Inadequate medical exams, inadequate reasons and bases, and inadequate notice of examination are a few of the most common reasons for remand. When an appeal is remanded, it returns to the jurisdiction of VBA through the Appeals Management Center (AMC), a separate entity where assigned VBA staff are tasked to remedy flaws in claims development identified by the Board. It is at the AMC where many remanded appeals idle on a procedural "hamster wheel" due to a failure to comply with the remand order, an automatic basis for continued remand. In some cases, AMC will simply reiterate the rationale of a medical opinion without applying legal analysis or render a decision without complying with the Board's remand directives thus unnecessarily extending the process.

However, the Board and appellants are also culpable to an extent. Both the Board and VBA share a predilection for wrongly favoring VA exams over most others and will require one before rendering a decision, even when private medical evidence or treatment notes from an appellant's treating VA physician is sufficient. This is an issue PVA has testified about on multiple occasions. Not only does this slow the claim or appeal of the individual veteran, it further slows the claims process when unnecessary resources are used to seek medical information VA already has. In addition, it increases VA costs and diverts them from serving other veterans who need exams.

Veterans also share responsibility when many appeals arrive at the Board with little to no merit. A disability claim that gets denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf or compels an accredited representative to do so with no legal basis for appealing, this clogs the process and draws resources away from legitimate appeals. PVA has taken steps to reduce these frivolous appeals by having claimants sign waivers when taking power of attorney. In addition, PVA has an attorney serve as Director of the PVA National Appeals Office which allows our organization to better evaluate the merits of an unfavorable VA decision before proceeding with an appeal.

There may be many avenues to improve the appeals process for claims. PVA offers the following recommendations for improvement:

- In order to reduce remands, the Board should order VA medical exams only when necessary and give appropriate weight to private medical evidence and treatments records from treating VA physicians.
- Granting the Board settlement authority, similar to that allowed by the Veterans' Court, will eliminate the need for time consuming additional development in cases where the appellant, an accredited representative, and the Board can agree to a resolution based on existing evidence of record.
- Review examination scheduling procedures to reduce the number of remands related to inadequate notice.
- Review AMC procedures and quality review as part of the VBA's 21st transformation effort, to include the implementation of new technologies where applicable.

Without improvements in the appeals process, PVA does not believe VA will be able to meet the Secretary's deadline of 2015 to end the claims backlog that has damaged both VA's credibility and damaged, and continues to damage, the lives of many disabled veterans.

Mr. Chairman, we would like to thank you once again for allowing us to address this issue. We hope that by continuing to seek the answers on claims delays, VA

will make meaningful reforms to ensure these claims are completed in a timely manner.

PVA would be pleased to take any questions for the record.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2013

No federal grants or contracts received.

Fiscal Year 2012

No federal grants or contracts received.

Fiscal Year 2011

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation—National Veterans Legal Services Program—\$262,787.

GREG E. MATHIESON, SR.

1. The following are a number of items I have experienced both in dealing with my disability claim before the Veterans Administration and that of my working on my fathers claim before the Veterans Administration.

2. My father Everett Albert Mathieson, now in his '80s is a Korean War Veteran, having served with the 1st Marine Division in the Chosin Reservoir in 1950 for a number of months. During that time temperatures reached to as low as minus 35 degrees F. As a result many US service members died or experienced frostbite.

3. My father filed claims with the Veterans Administration early on, given that back in the 50's and 60's many were simply hand written notes with paper and pencil and mailed to the VA. There were not copy machines, typewriters with carbons and others means of making duplicates in those days for the simple soldier now a civilian.

4. For over 5 decades my father wrote and pleaded with the VA for assistance, yet during those years, the VA did not recognize Frostbite as a war injury and did little or nothing to help the veteran.

The VA now recognizes the injury of Frostbite as described in their Military Health History Pocket Card for Clinicians. <http://www.va.gov/oa/pocketcard/korea.asp> which in brief states: *The Korean War was fought from 1950 until 1953 and pitted the United States, South Korea and their UN allies against North Korea and the Chinese Communists.*

Cold injuries including frostbite and immersion (trench) foot constituted a major medical problem for U.S. service personnel during the Korean War. Veterans of the Battle of the Chosin Reservoir are recognized as having suffered especially high rates of severe cold injuries. Cold accounted for 16% of Army nonbattle injuries requiring admission and over 5000 U.S. casualties of cold injury required evacuation from Korea during the winter of 1950–1951.

In many instances U.S. Service members did not seek or were unable to obtain medical care after cold injuries because of battlefield conditions. Documentation of such injuries may never have been made in their service medical records or may no longer be available.

It is important for VA staff examining and caring for veterans who have experienced cold injuries to be familiar with the recognized long-term and delayed sequelae. These include peripheral neuropathy, skin cancer in frostbite scars (including in such locations as the heels and earlobes), arthritis in involved areas, chronic tinea pedis, fallen arches and stiff toes, nocturnal pain, and cold sensitization. These cold-related problems may worsen as veterans grow older and develop complicating conditions such as diabetes and peripheral vascular disease, which place them at higher risk for late amputations.

5. My father was treated for a period of time at the VA Hospital at Northport, NY, though the VA repeatedly informed him of not having any records. My father

has maintained the VA Northport Hospital prescription bottles to this day along with related paperwork, yet the VA does not have copies.

6. A number of years ago, I became involved in my fathers VA disability claim seeing that he had been getting nowhere on his own and also with the service organization of the Purple Heart. I put in FOIA requests for both his records and mine for service records, medical records and more. After long periods of time we managed to start getting in bits of pieces of records from all the various service centers. To my surprise in one instant, I was sent a European Service Medal for participating in World War II, though I was born in 1954. Many records were lost over years, more recently in the past 4-5 years, by the Veterans Administrations own admission do to a computer change over of systems.

7. In May of 2012, at the ceremony with President Obama at the Vietnam Veterans Memorial I had the opportunity to speak with Veterans Administration Secretary Eric Shinseki about my father's case. A few days later someone from VA Headquarters contacted me and put me direct contact with someone at the New York City VA Regional Office who was working on my fathers claim.

8. After years of fighting the VA it had seemed that we might be on the right course of getting my fathers claim settled and medical treatment via the VA vs. my father having to pay for it all these past years. Finally a doctor familiar with Frostbite injures met with him and certified the injures and he was provided disability benefits starting at that time for his injuries. In the past VA doctors, unfamiliar with frostbite would dismiss his injures as being dermalogical and treated with skin creams.

9. Shortly there after my father was hospitalized for complications related to his frostbite after all these years, blood clots and other items continued. The VA office then continued to ask for more paperwork, more forms files out, making the process that was finally underway, even harder for my father. Keep in mine, many veterans in their 80's do not use or now how to use the Internet or type on a computer. My father, a man who did not have any formal education other then high school in the '40s could not understand the forms and needs of the VA's constant mailed questions.

10. The VA at times seems to constantly sends forms to the Veterans to fill out, with every letter of correspondence, even attaching it to the simple, we're working on your claim letter. This confuses the veterans of that generation in thinking they need to do something when in fact they do not.

11. We filed for an earlier effective date of my fathers claim for when he first filed it some five decades ago and asked that it be forwarded to the Board of Veterans Affairs in Washington DC for him to have a face to face hearing in Washington.

12. We were told it could not be forwarded to the BVA until all his treatments; medical claims and others were closed out in New York. He still had a claim pending for his hospital stay of over 30 days and the VA was awaiting more paperwork, though we provided his discharge papers showing his 30 days of stay in the hospital. At one point we told the VA it was not worth the months of waiting for a \$1,000 claim for hospitalization which was holding up is much bigger claim of an earlier effective date for is disability, which if approved would amount to hundreds of thousands of dollars in back payments.

13. We retained an attorney for the BVA hearing in Washington and waited for my fathers claim file to be forwarded to Washington to start the process, but it never showed up. I finally found that the file had been returned to the file storage as being closed out. We eventually got it to the BVA where it is today.

14. In dealing with BVA in my own hearing some 5 months ago, we were told that the BVA is currently reviewing hearing testimony from heard in 2010 and that I have some 46,000 cases before mine to review, all in order of coming in. The BVA Ombudsman confirmed this to me a few weeks ago.

15. After getting a copy of my hearing transcript from the BVA I read through to confirm that the hearing Judge, stated that I should be getting a final determination within 2-3 months, that he doesn't control what comes on his desk, but that's about the average time. When I read this statement to the BVA office rep, I was told that the judges routinely don't tell the veteran the truth, knowing that it can take years and want do so to make the veteran feel good and give them hope that someone is doing something.

16. I then also stated that in my hearing transcript, the judge makes mention of retiring in the next few months as well. When asked how this could effect my hearing I was told that I would have to return and have another hearing before another judge and start the process all over again, though my place in the docket for review would be the same.

17. In the transcript of my BVA hearing the judge states that he does not need to “develop” my case that basically it’s black and white and he has made a determination. In cases like this, the Judge should be allowed to make this ruling if in fact it is a simple matter that can be finalized to the benefit of the veteran and not keep him/her waiting another few years for the outcome.

18. I’m currently getting ready to have surgery and having both my knees replaced and I’m told that even though I again have to submit paper work for rehabilitation treatment and other related items, it can again, take up to a year or more of processing though my local VA office.

19. Another issue I learned is when asked about taking my son off of my current disability benefits when he graduates from college, I was told that it could again, take up to one year or more for the VA to suspend that payment, in fact I would keep getting paid for something I am not entitled to and then have to pay be back when the paperwork cached up within the VA some 12–14 months later.

20. I speaking to a veterans service organization representative, I was told that her husband had died over 5 years ago, yet though she told the VA that she was not allowed spousal support any longer, they kept providing it and then took it back years later. This seems to be the norm and down the road affects the veteran when his/her benefits are reduced to payback the money they were not entitled to, yet make the effort to inform the VA of the changes needed.

21. In the past few months, I have tried to reach out the Headquarters of the Veterans Administration on a number of issues, some personal and some as a member of the news media that covers Capitol Hill. I’m surprised to find in many cases, that he Veterans Administration does not list its numbers to the general public much like every other government agency. If you want to call the White House, they have a number listed. If you ask for a particular office at the Pentagon, you’ll be put through to that office, however there is not even a standard switchboard number for the Veterans Administration if someone should which to reach the Inspector Generals Office, the Chief of Staff an more.

22. Recently I went to the Veterans Administrations Headquarters and asked to speak to the Public Affairs office and was told without a name of a person, they could not call that office. The same applied to all the offices within the Headquarters. Even the Central Intelligence Agency has a main number to call to reach someone or an officer related to something.

It’s clear that the Veterans Administration has serious problems. They will not get fixed over night or in months unless there is a change in management and/or leadership with a plan on making changes. There are however some simple things that can be fixed now:

1. Being able to stop payment benefits when a spouse calls and says their loved one has died.
2. Judges at BVA should be honest with Veterans about time frames on reviewing cases and not provide false information to make the Veterans “feel good”.
3. Having a main number to call VA if you which to reach the Headquarters for other then dealing with a claim issue.
4. Not continuously sending forms to the veterans with every piece of correspondence when they are not truly needed.
5. Judges at BVA hearings should be allowed to make a final determination at the hearing, much like other courts, if the case is such that a simple determination can be made in favor of the veteran, thereby cutting down the docket of cases considerable and not keep veterans waiting for years when the remedy sought was simple and clear in nature and the judge agrees to it.
6. Doctors providing paperwork on a Veterans benefits claim do not speak the same language as the VA’s claims adjudicators. In my case an orthopedic surgeon would quote page number and paragraph listed in the American Medical Association yet the VA uses it’s own codes, which specifically need to be mentioned in the doctors reports to move the claim forward.

I'm writing this testimony not in the interest of being self-serving, but to bring to the Committee members attention some of the frustrations and time elements tens of thousand of Veterans are experiencing daily and also hoping of bringing some common sense solutions to some of the problems currently going on.

Sincerely,

//// Signed /////

Greg E. Mathieson Sr.

BERGMANN AND MOORE, LLC

Introduction

We thank Subcommittee Chairman Jon Runyan and Ranking Member Dina Titus for inviting Bergmann & Moore, LLC to submit a statement for the record regarding the continuing failure of the Department of Veterans Affairs (VA) to timely adjudicate Veterans' disability compensation claims remanded from the U.S. Court of Appeals for Veterans Claims (Court) or the Board of Veterans' Appeals (Board) back to the Veterans Benefits Administration (VBA).

Founded in 2004, Bergmann & Moore is a national law firm based in Bethesda, Maryland. We represent Veterans throughout the United States whose disability claims were denied by VBA, the Board, and the Court. Since 2004, the firm has successfully represented more than 1,500 Veterans and surviving beneficiaries at the Court. The firm's partners and several associates were previously employed with VA. Based on our VA background and practice concentration, we have a strong interest in ensuring VBA processes disability claims in a timely and accurate manner for our Veterans and their surviving family members.

Our statement focuses on appealed disability compensation claims handled by VBA. We acknowledge the Court does not have a backlog and appeals at the Court proceed through the system with improving speed.

"Why Are Veterans Waiting Years on Appeal?"

There are several reasons why Veterans are waiting years for VBA to finish adjudicating claims.

The primary reason for the unreasonable delay in processing appeals is because VBA does not make the final adjudication of appealed claims a priority. As recently as April 2013, when VBA announced a new policy of identifying and processing claims pending two years or more, VBA ignored appealed claims in the instructions to regional offices to identify and process significantly aged claims (VBA Fast Letter 20-13-05, "Guidance Regarding Special Initiative to Process Rating Claims Pending Over Two Years," April 19, 2013). This new evidence shows VBA does not make these claims a priority.

A second reason is that VBA does not have enough staff to complete existing and appealed claims in a timely and accurate manner. The evidence of a chronic staffing shortage was revealed last month when VA issued a press release and announced mandatory overtime for all VBA claims processing staff for the remainder of Fiscal Year 2012 ("VA Mandates Overtime to Increase Production of Compensation Claims Decisions," VA Office of Public and Intergovernmental Affairs, May 15, 2013). VBA's poor planning continues hampering VBA's ability process existing and appealed claims in a timely and accurate manner.

A third reason, as several Congressional hearings painfully revealed over many years, is the fact VBA emphasizes speed and production over quality and accuracy. A recent example of VBA's inappropriate and myopic focus on speed was repeated in April 2013, when VBA's Fast Letter 20-13-05 announced the agency would identify and process within two months all disability claims pending two years or longer. The artificial deadline to complete Veterans' disability creates an atmosphere within VBA where quality falls by the wayside. When VBA over-emphasizes speed, VBA makes additional errors that lead to more appeals further clogging the already overwhelmed VBA.

Bergmann & Moore reviewed recent rating decisions under VBA's new Fast Letter. We identified chronic and systemic errors confirming our noted concern last month that in VBA's haste to exalt speed over quality, VBA would make additional mistakes. We are concerned VBA issued thousands or more incorrect and incomplete rating decisions in an attempt to clear the decks of cases pending two years or longer. VBA's frequent and harmful mistakes that deprive Veterans of deserved disability benefits include:

1. A failure to properly develop evidence,
2. A failure to consider evidence favorable to the Veteran,
3. Improper denials for service connection when warranted by the evidence,
4. Incorrect low ratings,
5. Incorrect effective dates,
6. Incorrect reasons and bases for a decision, and
7. A VA medical exam that is incomplete, obsolete, or not ordered.

A fourth reason why Veterans wait is VBA's lack of nationwide training. We believe a more experienced VBA employee needs to be assigned the task of addressing VBA's errors identified by the Board or Court. VBA training results confirm the urgent need for additional nationwide training in order to avoid mistakes. This month, VBA publicly reported that new employees processed 0.6 claims per day with an accuracy rate of 60 percent after the first six months. After VBA's new "Challenge" training began, productivity rose to 1.5 claims per day with an accuracy rate of 94 percent (Under Secretary for Benefits Allison Hickey, presentation to the National Association of County Veteran Service Officers, Reno, Nevada, June 6, 2013). While these accuracy statistics seems unreasonably high in both instances, assuming the same methodology was used to determine both numbers it at least can be said that the training had a positive impact, even if not to the degree claimed by VBA.

However, VA reported 2,100 VBA employees, or 17 percent of VBA's 12,277 staff on hand during Fiscal Year 2012, completed the new "Challenge" training (Witness Testimony of The Honorable Eric K. Shinseki, Secretary, U.S. Department of Veterans Affairs, "U.S. Department of Veterans Affairs Budget Request for Fiscal Year 2014," House Veterans' Affairs Committee, April 11, 2013; U.S. Department of Veterans Affairs, "Volume III, Benefits and Burial Programs and Departmental Administration, Congressional Submission, FY 2014," April 10, 2013).

Bergmann & Moore urges VBA to implement mandatory and universal training throughout VBA. We understand and appreciate the fact that when VBA sends already thin ranks of employees off to training, productivity temporarily falls before quality improves. This is why long-term planning for both staffing and training are needed so VBA can both accurately and timely process Veterans' disability claims.

Continued Congressional Oversight Remains Essential

This important Congressional oversight hearing about VBA's broken claim appeal system occurs less than one month after Bergmann & Moore submitted a statement for the House Veterans' Affairs Committee's hearing on VBA's questionable plans to adjudicate claims pending two years or longer at VBA ("Expediting Claims or Exploiting Statistics?: An Examination of VA's Special Initiative to Process Rating Claims Pending Over Two Years," May 22, 2013).

In our prior statement, Bergmann & Moore reviewed VBA's questionable plans to process claims pending two years or longer. We documented for the record how VBA ignored claims remanded from the Board and the Court in the face of strong and clear laws enacted by Congress that appealed claims must be provided "expedited" treatment (38 USC § 7112: Expedited treatment of remanded claims. "The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims"). We described VBA's Fast Letter 20-13-05 wherein VBA failed to mention how the agency would identify and then provide expedited handling for appealed claims.

On behalf of our clients, Bergman & Moore reports to Congress again how we remain deeply dismayed at VBA's continuing failure to provide expedited processing of appealed claims, nearly all of which remain pending more than two years. In fact, we find it absolutely unacceptable that some appealed claims remain pending at VBA for a decade or longer.

VBA's refusal to acknowledge and follow this important law protecting Veterans' rights causes real and significant harm to Veterans because they often go without the VA healthcare and economic support provided to Veterans with service-connected disabilities – assistance they urgently need to improve their health as well as feed and house themselves and their families.

The consequences for VBA's delays processing appeals are significant: as many as 53 Veterans die each day waiting on a VBA claim decision. Due to a lack of VBA transparency, no one knows how many Veterans died, or how long they waited, for VBA to process an appealed claim.

VBA's chronic inability to process appealed claims pending at VBA in a timely manner is worthy of prompt and forceful Congressional action so that far fewer Vet-

erans die waiting on VBA for the disability benefits they earned for medical conditions associated with their military service.

Solutions

Congress should consider several practical solutions to address VBA's claim appeal quagmire. We thank Congress for taking the first and most important step toward resolving VBA's claim delay and error crisis: holding this hearing today and demanding accountability from VBA leaders. We ask Congress to hold a series of hearings on this important issue until such time as VBA reaches the goal of providing expedited processing of Veterans' disability claims on appeal, as required by law.

We respectfully ask Congress to consider the following additional six steps:

1. Order VBA to improve and increase transparency so Congress knows the extent of the crisis.

Last month, Bergmann & Moore asked Congress to determine the number and length of time appealed claims languish at VBA after a remand from the Board or Court. In order to determine the scope and depth of VBA's appeal delay crisis, VBA must provide this salient data on a monthly basis to Congress and the public.

The only public information available appears on VBA's "Monday Morning Workload Report" (MMWR). As of June 17, 2013, VBA reported 251,244 appealed claims pending. In order to monitor compliance with the law and performance, VBA should be required to obtain and share the nationwide number of pending appealed claims, sorted at the regional office level, including:

- A. The source of those claims (i.e., on remand from the Board or Court),
- B. The length of time pending on remand,
- C. The accuracy of appealed claims completed by VBA after the remand,
- D. The number of remands per claim, and
- E. The number and types of errors identified by the Board and Court

2. Order VBA to develop and implement a plan to promptly process appealed claims.

We are not aware of any VBA plan to identify and expeditiously adjudicate appealed claims now pending at VBA regional offices, as already required by law. This means VBA continues to ignore the law, even in the face of repeated Congressional action and oversight hearings.

Therefore, Congress should ask VBA if it has the ability and intent to follow Section 7112. Specifically, Congress should ask VBA for a specific date the agency will have sufficient staff and training as well as a detailed plan with benchmarks to ensure our Veterans receive an expedited review of an appealed claim.

3. Order VBA to increase the number and improve the performance of Attorney Fee Coordinators at regional offices.

In November 2012, Bergmann & Moore wrote VBA regarding the need to improve access to VBA points of contact for VA-accredited attorneys and private practitioners representing Veterans. Updates on the status of a claim are obtained from the Attorney Fee Coordinators (AFC) at each VBA regional office. Bergmann & Moore advised VBA how the Detroit regional office would not provide the status of a Veterans' claim or provide other pertinent information vital to the claim. VBA's actions deprive Veterans of quality representation and due process.

In January 2013, VBA responded to our letter without addressing our complaint about the Detroit regional office. The same month, Bergmann & Moore again wrote VBA and asked for a point of contact at VBA's Central Office in Washington, DC to resolve refusals of AFCs to provide information. Five months later, VBA still has not responded. Our goal is for VBA to increase the number of AFCs so there is at least one on duty at each regional office who can respond in a timely and accurate manner about the status of our clients' claims. We also hope VBA identifies a point of contact in Central Office who can resolve cases where an AFC refuses to provide pertinent information. In a related matter, VBA still has not provided on-line, real-time, computerized access to Veterans' claim records for VA-accredited attorneys and agents representing Veterans. While we support the goal of computerizing VBA claim processing, we strenuously object to the unreasonable manner in which VBA has locked out attorneys and agents.

4. Order VBA to improve and expand its Disability Benefit Questionnaires.

VBA continues increasing the number and the use of Disability Benefit Questionnaires (DBQ), a standardized form where VA medical professionals document the existence and severity of medical conditions during a Compensation and Pension (C&P) exam. DBQs are specific for each specific medical condition. According to VBA, “Of the 987,353 examination requests, 255,747, or 25.9 percent, contained [an additional] DBQ medical opinion worksheet.”

We have concerns about DBQs because the form is also used by private medical professionals and it does not include space for the provision of nexus opinions. Nexus opinions are absolutely critical to a successful claim, as a claim without a nexus cannot be successful (for example, *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009); *Horn v. Shinseki*, 25 Vet. App. 231, 236 (2012)).

Based on VBA’s own statistics, hundreds of thousands of Veterans’ disability claims could avoid prolonged appeals and delays each year if VBA simply incorporated a nexus opinion request question on each DBQ form rather than asking examiners to complete an additional medical opinion worksheet.

Thus, DBQs should be amended to include a place on the form for a private practitioner to offer a nexus opinion. Such an opinion would provide significant probative value, especially for initial disability claims where the Veteran seeks service connection. The current lack of a nexus opinion on DBQs often leads to appeals that languish for years.

5. Order VBA to suspend the Standardized Notice of Disagreement.

Bergmann & Moore is concerned about VBA’s new Standardized Notice of Disagreement (SNOD) because the new form is highly technical and therefore adversarial to Veterans without advanced legal training. The form forces each Veteran who wishes to disagree with a regional office rating decision to identify and report VBA’s error, such as the claim’s effective date or a conditions percentage rating.

We are troubled about VBA’s use of SNODs because an unrepresented Veteran, especially a vulnerable Veteran with brain damage (such as traumatic brain injury) or a mental health condition (such as posttraumatic stress disorder), may be at a distinct disadvantage. Such a Veteran may not understand what is asked or required using VBA’s SNOD. As a result, a Veteran may not identify all of VBA’s errors, and thus lose appeal rights for VBA’s errors, further complicating and lengthening the appeal process. This is especially important for appeals involving individual unemployability that often require detailed knowledge of and experience using VA laws and regulations.

Under the law, all a Veteran is required to do is provide a written notice of disagreement in a timely manner in order to begin the appeal process. There is no legal requirement for a Veteran to cite VBA’s specific error (38 USC § 7105(a)). Forcing a Veteran to do so on a new and technical form establishes a new process. VA has not provided for notice and comment on such a substantial rule change impacting Veterans’ due process rights. Therefore, the implementation of SNOD should be suspended.

Conclusion

Bergmann & Moore thanks Congress for holding this critical hearing on VBA’s chronic inability to process more than 250,000 Veterans’ appealed disability claims in a timely manner. We believe there is no “silver bullet” solution to VBA’s chronic problems. Similarly, there is no single fix for VBA’s willful failure to adjudicate claims on appeal from the Board and Court in an expedited manner.

We believe a set of practical solutions and vigorous oversight, as described above, should provide the information and tools VBA and Congress need to accurately identify and properly resolve this longstanding issue and thereby improve VBA’s appeal claim processing speed and accuracy for our Veterans and their families.

Time is of the essence. Our bottom line is that no Veteran should die waiting on a VBA claim decision, especially Veterans who received a remand from the Board or the Court and are entitled to an expedited final adjudication of their claim, as required by law.